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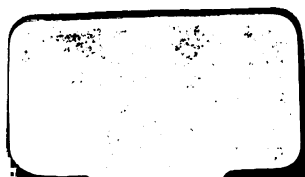
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**CONTENTS:—**Introductory. Chap. I. What Books to Read. II. The Various Subjects, and how to deal with them. III. Course of Reading. Appendix.—I. Test Papers. II. Useful Hints. Index.

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# Intermediate Law Examination

MADE EASY.

A  
COMPLETE GUIDE TO SELF-PREPARATION

IN

MR. SERJEANT STEPHEN'S

NEW COMMENTARIES

ON THE

LAWS OF ENGLAND.

---

THIRD EDITION.

---

BY

ALBERT GIBSON,

SOLICITOR,

(Honors, Easter Term, 1874.)

AUTHOR OF "AIDS TO THE FINAL," "AIDS TO THE INTERMEDIATE," "AIDS TO  
EQUITY," AND EDITOR OF "THE LAW NOTES."



LONDON:

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1882.

# The Intermediate and Final Examinations of the Law Society.

THE Author prepares Candidates for these Examinations in Class or by means of Correspondence through the Post. The following table shows the success of his Pupils for the Final during 1881:—

Examination.	No. of Pupils in.	No. passed.	Honors.
January .....	22	20	4
April .....	20	19	9
June .....	26	24	4
November .....	24	23	8
Total .....	92	86	25

These 25 Honormen included *two* Clifford's Inn Prizemen, one New Inn Prizeman, besides several Prizemen of the Incorporated Law Society.

In June there were only 6 Prizemen, and of these two were Pupils of the Author.

In November there were 12 Prizemen, and of these three were the Author's Pupils.

At the Intermediate Examinations also, during 1881, great success attended Mr. GIBSON's Pupils, notwithstanding the large percentage postponed: thus, at the November Intermediate 35 Pupils were sent up and 33 passed.

## CLASS PREPARATION.

In Class Preparation the work is thoroughly and systematically done, and all idea of preparing on a mere "Cram" system is discarded, a mode of preparation dangerous as far as the Examination is concerned, and entirely useless for other purposes. Students desirous of joining any particular class are requested to communicate as early as possible with Mr. GIBSON, so that he may map out their work till the class begins and also keep a vacancy in the class. Classes commence three months beforehand (fee £12:12s.), and a Special Class one month before the Examination (fee £6:6s.). The fee for two months is £10:10s. Classes at present meet, and will probably continue to meet, every day except Saturday. A Special Final Class commences four months before the Examination (fee £16:16s.).

## POSTAL PREPARATION.

This is carried out by weekly (or more or less frequent) correspondence. The work for each week is allotted for the Pupil to follow. Papers of questions and notes bearing on the week are sent him. His attention is drawn to cases and statutes of importance, and generally he is taken through all the subjects as carefully as he would be in Class Preparation. Great success has attended the Author's Postal Pupils, and by way of illustration it is only necessary to refer to the November Examinations last year, at which, out of 22 Postal Pupils sent up, 21 passed, four of them obtaining Honors, one being Clifford's Inn Prizeman. To take the Student carefully through Stephen's Commentaries, the Six Months' course of Weekly Correspondence is recommended. Fee, £10:10s.

The Fee for Weekly Correspondence for Three Months is £6:10s.; for Weekly Correspondence for One Year (the time recommended for the Final) the fee is £16:16s.; and for Fortnightly Correspondence, £12:12s.

Fees are payable in advance, except for Postal Preparation when the correspondence extends over Six Months, the fees being then payable quarterly in advance.

## PARTICULARS.

Further particulars can be obtained on application, either personally or by letter, at 35, Southampton Buildings, Chancery Lane, where the Classes are held.

## PRELIMINARY EXAMINATION.

Pupils for this Examination are prepared by the Author's brother, Mr. JOHN GIBSON, M.A., Bromley, Kent, to whom application must be made for particulars.

At the October Preliminary, out of 12 Resident and Class Pupils, 11 passed.

## PREFACE

TO THE THIRD EDITION.

---

WHEN the Examination Committee of the Law Society selected Stephen's Commentaries on the Laws of England as the subject for the Intermediate Examination, it appeared to the Author of this Guide that it was the intention to make that Examination a very searching one, otherwise so wide and difficult a subject would not have been chosen. With this belief he prepared the last Edition of the "Intermediate Law Examination Made Easy" on so thorough and systematic a plan, that the Student who used it could not fail to have his attention drawn to every point on which there was any chance of a question being asked.

The Examinations which have been held on Stephen's during the last two years have proved that the Author's anticipations were correct, the questions asked having been of such a searching nature that only those candidates who had prepared their work on some thorough system could have possibly acquired the requisite number of marks. As far as can be gathered, there is no chance of the questions at the Examinations becoming easier or the standard of marks lowered, and, therefore, in preparing the present Edition, it has been thought desirable not to materially deviate from the course of work laid down in the last Edition, whereby the Student is taken carefully through the Commentaries from beginning to end, no point of importance being passed over. In one or two particulars,

however, it has been attempted to introduce improvements. Thus, the effect of the Conveyancing Act, 1881, has been inserted where necessary, the translations of the Latin Maxims have been placed in alphabetical order in one Appendix instead of at the end of each Volume, and the Test Papers and Lists of Statutes instead of being given in Appendices have been incorporated into the Work itself.

With regard to Book IV., as it no longer forms a part of the work for the Intermediate, it has been excluded from the course of reading; but as some Chapters treat of matters of importance for the Final, it has been thought advisable to give an epitome of them in the proper place.

In conclusion, it is desired to point out that to the Student who merely wishes to be "crammed" with just sufficient knowledge to pass his Examination this Guide will be of no use. The Author is convinced that the days are happily gone by for such knowledge to be of any service. There is now no "royal road to passing," the work must be done systematically and well, and it is only to those Students who are ready to do their work in this sensible way that the Guide will be of service. To such it is hoped it will prove of use, and that by following the course recommended the Student will acquire a knowledge which will not only enable him to pass his Intermediate Examination without difficulty, but which will also prove invaluable to him when preparing for his "Final," and in his future legal career.

ALBERT GIBSON.

35, SOUTHAMPTON BUILDINGS, CHANCERY LANE.

*February 27, 1882.*

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## INTRODUCTORY.

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THE task which you have before you, namely, that of acquiring an accurate knowledge of the four volumes of Stephen's Commentaries (excluding Book IV.)—a work which treats, as the author tells his readers, of the entire body of the English law—is a formidable one, and you must not expect to accomplish it without very diligent and patient reading, carried out in a regular and systematic way. Before apportioning out your work for each week during the Six Months' course, I will add a few suggestions to guide you in your reading.

### AVERAGE NUMBER OF HOURS WORK EACH DAY.

I. With regard to the number of hours to be devoted to reading *every day*, it is not possible to lay down any fixed rule, as on some days you will probably be much more inclined for work and able to do much more than on other days; but I think you will find that *an average* reading of four hours a day during the six months will be sufficient to enable you to go through the course in a satisfactory manner.

### MANNER OF READING.

II. Your reading should be done when you are alone, and on this account I recommend you not to read during office hours, unless you have a room to yourself and are otherwise free from all likelihood of disturbance. You should not slur over a point you do not at first understand, but endeavour to master it before reading farther; failing this, you should make some mark against it, and read on. At some future occasion you should refer back to these marks, and you will then probably find that by the aid of your increased knowledge the difficulty is overcome. When reading, give your whole mind to it,

and do not allow your thoughts to wander. Remember that one hour's good earnest reading is worth a whole day's desultory reading.

### THE LAST MONTH.

III. During the month immediately preceding the Examination, if your principal will allow it, your whole time ought to be devoted to reading; and if at this time you find there are points on which you are doubtful, it will be very advisable for you to come to town and obtain the assistance of some gentleman who gives his attention to preparing pupils for the Legal Examinations.

### TEST PAPERS.

IV. You must devote one day in each week's work to answering the test papers of questions set for each week. I cannot impress upon you too strongly the necessity of knowing how to answer a question properly when in for Examination, and the power to do this can only be acquired by practice.

In working out the questions set, adopt the following plan: First, go very carefully through the questions, looking up in your text-book such of them as you do not feel sure about; then draft the answers from memory, taking care to follow the *wording of the questions*, and to answer *every part of them*; then correct your answers, and enter them carefully and neatly in your note-book. By adopting this plan you cannot fail to have all the leading points touched upon in the questions firmly impressed on your memory; and you will be able, just before the Examination, to read over the questions and answers, and, having worked them out yourself, the subject-matter of them will readily come back to you.

V. The page references are to the Eighth Edition of the Commentaries.

THE  
**Intermediate Law Examination**  
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(EIGHTH EDITION).

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INSTRUCTIONS.

FIRST read a chapter in the Commentaries, then go through the chapter in the Guide, looking up all the points which you feel doubtful about in the text-book.

At the end of each week, work out the test paper given in the manner suggested in the Introduction.

If six months are given to the work, follow the course laid down strictly.

If twelve months are devoted, *either* give a fortnight to each week's work *or* go through the course twice in the manner laid down.

If three months only are given, give a week only to the work allotted for two weeks.

If notes are made, let them be as short and pithy as possible.

---

COURSE OF READING.

---

First Week's Work.

BOOK I.—THE INTRODUCTION.

This must be read carefully, as it contains matter upon which, up to the present time, the examiners have asked and are likely to continue to ask questions. It contains four sections, viz. :—

SECT. I.—*Of the Study of the Law.*

„ II.—*Of the Nature of Laws in general.*

„ III.—*Of the Laws of England.*

„ IV.—*Of the Countries subject to the Laws of England.*

SECT. I.—*Of the Study of the Law.*

## REMARKS.

You will see, from the cogent reasons laid down in this section, how desirable it is for the nobility, gentlemen of fortune, clergy and members of the medical profession, as well as those intending to take up the legal profession, to study the laws of England; and it will no doubt strike you that, although a knowledge of the law is with these persons only desirable, with you it is an absolute necessity, and the remembrance of this will spur you on to a diligent perusal of what, as I have before said, you must expect to find a difficult task.

## POINTS TO NOTE.

- I. The distinction between the civil, the canon and common law.
- II. The circumstances under which the civil law and the canon law were introduced into this country, and how it happened that the civil law was taught by our bishops and clergy in our universities and colleges to the exclusion of the common law.
- III. By what incident the common law was prevented from being overrun by the civil law in the reigns of King John and Henry III.
- IV. What the origin of the Inns of Court and Inns of Chancery was.

SECT. II.—*Of the Nature of Laws in general.*

## REMARKS.

This section shows plainly the distinction between the *revealed* and *natural law*, the *law of nations* and *municipal law*. With regard to the *revealed law* you will bear in mind that it is composed of the doctrines to be found only in the Holy Scriptures, having been expressly declared to be the law of nature by God himself, and it is therefore of greater authenticity than the *natural law*, or the law made by ethical writers on what they imagine to be the law of nature. All human laws must be based upon the revealed and natural laws, and if a human law command that to be done which the revealed or the natural law forbid, the former must be disobeyed and the latter followed. Where, however, the revealed and natural laws make no command or injunction, the matter being indifferent, the human law has full play, and can declare this or that to be right or wrong.

The *law of nations*, or *international law*, is based upon the rules of the natural law, or upon mutual compacts entered into between

different states and nations to regulate their dealings with one another.

The *municipal law* is the law or rule which governs particular districts or communities. It is defined as a "*rule of civil conduct prescribed by a supreme power in a state.*"

It is a *rule*, because it has permanency and universality, and also because it operates as an injunction, and lays down imperatively what has to be done, and what has to be abstained from.

It is a rule of *civil conduct*, because it not only considers man as an individual, but also as a citizen ; and lays down rules, to be observed by him as such towards his neighbour, for the subsistence and peace of the society of which he is a member, beyond what nature and religion impose upon him.

It is a rule of civil conduct *prescribed*, because it does not become law until it has been duly and publicly notified.

It is a rule of civil conduct *prescribed by the supreme power in a state*, because the very essence of a law depends upon its being made by the supreme power or the sovereignty of a state, and if made by any one else it has no force or effect. This supreme power with us is entrusted to three distinct powers entirely independent of each other (and herein lies its strength), viz., first, the sovereign ; secondly, the lords spiritual and temporal (the House of Lords) ; and, thirdly, the House of Commons.

The municipal law consists of three parts—

One, the *declaratory*—showing clearly what rights have to be observed, and what wrongs abstained from.

Another, *directory*—which needs no explanation.

A third, *remedial*—that is, the part which points out the remedy in case rights are wrongfully withheld or wrongs committed.

To which may be added a fourth part, namely, the *sanction*—which is with us generally *vindictory* and not *remuneratory*.

#### POINTS TO NOTE.

- I. An explanation of the maxim, "*Quod naturalis ratio inter homines constituit, vocatur jus gentium.*" (See Appendix A.)
- II. What is meant by making laws *ex post facto*, and why this method of legislating is unreasonable.



- III. What the three forms of government are, and how they differ.
- IV. Why it is the *duty* as well as the *right* of the supreme power to make laws.
- V. What is meant by saying that the *sanction* of the laws is rather *vindicatory* than *remuneratory*, and the reason of its being so.
- VI. What the distinction between *mala prohibita* and *mala in se* is.

### SECT. III.—*Of the Laws of England.*

#### REMARKS.

The municipal law of England is divided into two kinds, the common law, or the *lex non scripta*; and the statute law, or the *lex scripta*.

The common law, as distinguished from the statute law, consists of a collection of maxims and customs, which derive the force of laws from long and immemorial usage. It is called the *lex non scripta*, or unwritten law, not because it embraces unwritten laws only, for of nearly all of them there is some written memorial, but because it embraces laws of *the origin of which* there is no record in writing, it being one of the perfections of the common law that it has been in use *time out of mind*, which is now held to mean before the reign of Richard I., 1189; and if some law can be shown to have been created since that time, then it cannot form part of the common law, or *lex non scripta*, of the realm.

The customs constituting the common law are either general or particular.

*General customs*, or the common law properly so called, regulate the proceedings in all the ordinary Courts in this country. *Inter alia*, these customs regulate the forms, solemnities and obligations of contracts, the remedies for civil injuries, &c.

*Particular customs* affect only the inhabitants of particular districts. Such is the custom of gavelkind in Kent, where all the sons take the lands together as coparceners; such also is the custom of borough-English, existing in certain ancient cities and boroughs, whereby the youngest son inherits to the exclusion of all the others. Such also are the various customs of the city of London with regard to trade, married women, widows and orphans.

With regard to *general customs*, their existence is made known, and

their validity determined, by the judges of the land ; but with regard to *particular customs*, unless they are taken notice of by the law, the party alleging them must prove their existence, and also show that the thing in dispute is within the custom alleged. Where proof of the existence of the custom has been supplied, the further question of whether the custom is a legal one or not has to be decided, and in arriving at a decision on this point certain rules have been laid down, which you must carefully get up.

It is the duty of the Courts to decide what customs are good and what are not ; and their decisions, though liable to be set aside by some other judge for good cause, acquire, until so upset, the force of precedents and rules of law, and, being recorded in the Books of Reports, form a part of the common law.

Beside the two branches of the common law thus constituted by General and Particular Customs, there is a third branch, comprising those parts of the civil and canon law which have only been adopted by us, and, not having been enacted here, form a part of our laws only from the fact that they have been received in particular Courts by immemorial usage and custom, and thus they are properly considered as a branch of the *lex non scripta* rather than of the *lex scripta*.

So much for the common law of the land. A very few words must suffice with regard to the other branch of the municipal law, viz. the *Statute Law*, or the "*lex scripta*," consisting of the various "statutes, acts and edicts made by the sovereign by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled." The statutes are divided, first of all, into *public* and *private* statutes, according as they affect the public generally, or have only application to some particular place or places, person or persons ; secondly, into *declaratory*, where they confirm the common law ; *penal*, where they impose some penalty for an offence committed ; and *remedial*, where, without imposing any penalty, they redress some abuse or inconvenience with which our existing law is found to be attended ; thirdly, into *enlarging* or *restraining* acts, according as they serve to enlarge or abridge the previous laws ; and fourthly, into *enabling* and *disabling* acts, terms which speak for themselves and require no explanation.

In construing statutes, it is the duty of all Courts to interpret them according to the intention of the legislature. You must carefully get up the rules as given in Stephen, pp. 72 *et seq.*

I trust you will now have some fair, general idea of the difference between the common law (including the civil and canon law) and the statute law of the realm; and it only remains to add a few words concerning that part of the unwritten law which was enforced in the Court of Chancery before the abolition of that Court by the Judicature Act, 1873, and which now is practically, notwithstanding the supposed fusion of law and equity, enforced in the Chancery or Equity Division of the High Court of Justice, and which, as distinguished from law, is known by the technical name of *Equity*.

The origin of Equity, though involved in some obscurity, is to be traced to the defects of the Common Law Courts. There were some rights which were wholly ignored at law, such as trusts, administrations of deceased persons' estates, the rights of mortgagors in the mortgaged property; and as the legislature neglected to provide a remedy for these rights if withheld, a new Court was instituted under the name of the Court of Chancery, with the object of giving a remedy for all wrongs for which relief was really needed, and for which none was given at law. Once established, this Court was not satisfied with providing a remedy in these cases only, but interfered and controlled the Courts of Law in other matters in which the latter Courts did give some relief, but, as the Court of Chancery considered, of an inadequate nature; in fact, as you will see in a subsequent part of the Commentaries, to this power of giving fuller relief may be traced the reason of the Court of Chancery obtaining so extensive a jurisdiction as it did obtain. For the origin of many doctrines of Equity it is necessary to look to the Roman Law, a fact readily understood when it is remembered that the early chancellors were ecclesiastics versed in Roman Law.

#### POINTS TO NOTE.

- I. What the three principal systems of law in force at the commencement of the eleventh century were.
- II. In what way the general customs constituting a part of the common law were handed down from generation to generation.
- III. What is meant by the "*Lex mercatoria*" of the land.
- IV. In what way particular customs, when not taken notice of by

the law, must be proved, and how with regard to such proof the customs of London differ from other customs.

- V. What is meant by the maxim, "*Malus usus abolendus est.*" (See Appendix A.)
- VI. What the leading rules are for determining the legality of particular customs.
- VII. For how long a custom must have been in existence to make it of any force, and what qualification on this point is made with regard to rights of common and easements by 2 & 3 Will. 4, c. 71.
- VIII. Why it is that a custom that no man should put his beasts on to the common till the 3rd October is good, while a custom that he should not do so until after some other person has put on his would be bad.
- IX. What the meaning of the maxim, "*Id certum est quod certum reddi potest,*" as applied to customs is. (See Appendix A.)
- X. Why it is that a custom in a manor enabling a man to convey his estate in fee enables him to convey for life.
- XI. Why it is that the civil and canon laws are considered to form part of the common law or *lex non scripta*.
- XII. Of what the Civil or Roman Law (*Corpus juris civilis*) and the Canon Law (*Corpus juris canonici*) respectively consist.
- XIII. In what Courts and on what grounds these laws are permitted, and with what restrictions and in what respects they are inferior branches of the common law.
- XIV. How *legatine* and *provincial* constitutions differ.
- XV. What the difference between enlarging and restraining acts and enabling and disabling acts respectively is.
- XVI. What the leading rules are by which the Courts are guided in construing statute law.
- XVII. What the meaning of the maxim, as applied to the construction of statutes, "*A verbis legis non recedendum est,*" is. (See Appendix A.)

- XVIII. When a case is said to fall within and when outside "the Equity of a statute."
- XIX. What rule for construing statutes is illustrated by the maxim "*Leges posteriores priores abrogant.*" (See Appendix A.)
- XX. What was formerly and what is now the result when a statute which repealed another is itself repealed.
- XXI. What statutes *in pari materia* are.

SECT. IV.—*Of the Countries subject to the Laws of England.*

REMARKS.

"By the common law, the municipal law of England does not extend to any places out of itself, and therefore does not include within its jurisdiction Wales, Scotland, Ireland, Berwick-upon-Tweed, or any other part of the dominions of the crown;" but, as the laws of England now obtain in all of these, it is necessary first, to review them shortly, and then consider the kingdom of England itself.

*Wales.*—After remaining many centuries independent of England, Wales was finally conquered by Edward I.; and, ever since, the king of England's eldest son has borne the title of "Prince of Wales." Although, by the Statute of Wales (12 Edw. 1) very material alterations were made in their laws, yet the Welsh retained much of their original civil constitution, and particularly their law of inheritance, which resembled the custom of gavelkind prevailing (even to the present day) in the county of Kent. By subsequent statutes, their provincial privileges were still farther diminished, and ultimately abolished by the statute 27 Hen. 8, c. 26 (as confirmed and enlarged by the 34 & 35 Hen. 8, c. 26). [The chief enactments of these statutes, which are set forth in the Commentaries, should be carefully noted.] Before the Reform Act of 1832, it may be remarked that Wales returned only one member instead of two (the usual number in England), in respect of such of its counties and towns as were represented in parliament. By the effect of that act, however, three of its counties returned two, and the remaining counties one member each.

*Scotland.*—The union of Scotland with England was effected in the year 1706 by the Act of Union, which comprised twenty-five articles. [The purport of the most important is given in the Commentaries, and must be looked up; also Blackstone's observations upon them; regard being also had, with respect to these latter, to Stephen's remarks in the foot-note (see pp. 86 *et seq.*).] It may here be remarked, that the municipal laws of England are, generally speaking, of no force or validity in Scotland, nor, on the other hand, are those of Scotland in England. If any question upon Scottish law happens to arise in our courts, it is treated as a matter of fact to be ascertained by evidence. Finally, all acts of parliament extend to Scotland, unless that country is expressly excepted, or the intention to except it is otherwise sufficiently indicated.

*Berwick-upon-Tweed.*—This town was originally part of the kingdom of Scotland, and as such was for a time reduced into the possession of the English crown by Edward I., from whom it received a charter, which was confirmed by Edward III. with some additions. Its constitution was remodelled by a charter of Jac. I., and all its liberties, franchises and customs confirmed in parliament by the statutes 22 Edw. 4, c. 8, and 2 Jac. 1, c. 28. By statute 20 Geo. 2, c. 42, s. 3, it was declared that this town had been and should be comprehended in any statute in which England only was mentioned. Though it has some local peculiarities it is now clearly a part of the realm of England, and is duly represented in parliament. Berwick is no part of Northumberland: it is a county of a town corporate.

*Ireland.*—Although the laws of England were introduced into Ireland on its conquest by Henry II. and ordained and established by subsequent princes; yet the Irish, notwithstanding its formal abolition in Edward III.'s reign, still clung with tenacity to their native *Brehon* law (so styled from the Irish name of judges, who were called Brehons), which they preserved even in the reign of Elizabeth. The title "King of Ireland" was first assumed by Henry the Eighth. Although our common law was the rule of justice in Ireland, yet as the Irish had a parliament of their own, English acts of parliament did not extend there unless Ireland were specially named or included under general words. The liberty, however, of being allowed to make their own laws having been abused, a set of statutes known as *Poyning's laws* was passed in Henry VII.'s

reign, one of which, amended by an act of Philip and Mary, provided in effect that all acts of parliament which they proposed to pass should be first sent to the king for his approval. By another of Poynings' laws, in order to give Ireland the benefit of the English statutes, it was enacted that all English acts of parliament, made previously to such law, should be of force in Ireland; but no act made after that enactment was to bind Ireland, unless it were expressly named or included under general words. In 1801 the union of Ireland with Great Britain took place. [The most important provisions of the Articles of Union are given in Stephen and must be noted, see p. 96.] By one of these provisions it was enacted that there should be one parliament for the two kingdoms, in which Ireland should be represented by 105 commoners and 28 peers. Finally, since the Union all acts of parliament extend to Ireland, unless specially excepted, or the intention to except it is otherwise plainly shown.

*The Isle of Man.*—This is a distinct territory from England, and is not, in general, governed by our laws, but by acts of its own local legislature, the House of Keys. Acts of parliament extend there only when expressly named, and the only process which runs there from the English courts is the writ of habeas corpus. This island was formerly in the hands of private persons, to whom grants of it had been made by various kings of England; but in 1765 it was purchased for the use of the crown, and since then has been inalienably vested in it.

*The Channel Islands.*—These were united to the crown of England by the first princes of the Norman line.

They are governed by their own laws, which are contained in a book of very great authority, entitled "Le Grand Coustumier." Process from the English courts, with the exception of the habeas corpus writ, has no force in these islands. Acts of parliament extend to them only when particularly mentioned; all causes are tried by their own officers, but an appeal lies to the sovereign in council as a last resort.

*The Colonies.*—These are gained by conquest or treaty from other states, or are acquired by mere occupancy where they are found desert and uncultivated. There is this difference between the two species of colonies: in acquired or ceded countries that have already

laws of their own, such laws remain in force until changed by competent authority; but in countries acquired by occupancy, all the English existing laws, or rather so much of them as is requisite for present purposes, are immediately in force there. The right of appointing governors to colonies, and of issuing warrants for the appointment of officers, is exercised by the sovereign, and the right of legislation with regard to colonies gained by conquest or cession is vested in the crown, but this is not the case with such as are acquired by occupancy. Where, however, in any colony a representative assembly has been summoned by direction of the sovereign, such colony is no longer subject to crown legislation. All our colonial possessions are subject to the legislative control of the British parliament, but they are not affected by acts of parliament, unless referred to by name, or under a general description.

It is now necessary to consider the kingdom of England itself.

ENGLAND.—The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

I. *The Ecclesiastical Division*.—This is primarily into two provinces—those of Canterbury and York: provinces are subdivided into dioceses, each diocese into archdeaconries, each archdeaconry into rural deaneries, and each rural deanery into parishes. A parish is that circuit of ground which is committed to the charge of one parson or vicar, or other minister having cure of souls therein. That the division of parishes is of some antiquity may be gathered from the fact that about the year 970 it was ordered by a law of King Edgar—in consequence of the arbitrary nature of the consecration of tithes, each person paying tithes to whatever church he thought fit—that “*Dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet*”—That all tithes shall be paid to the mother church to which the *parish* belongs. The boundaries of parishes, it would seem, were originally ascertained by those of a manor or manors, since parishes are generally co-extensive with one or more manors. Although originally an ecclesiastical, there has been, more particularly in modern times, a gradual tendency to treat a parish equally as a civil division: thus the collection and application of the poor rate and other species of local taxation is parochial. As a parish, its affairs both ecclesiastical and civil are regulated in *vestry*, which is an assembly of the minister, churchwardens, and parishioners. It takes



its name from being commonly held in the "vestry" room adjoining the church; but where the population of a parish is large it is usually held in the town-hall erected for that purpose. The chief duties of the vestry are to inquire into and control the expenditure of the parochial funds and elect certain parochial officers; there are however other matters in which they possess an authority, *e.g.*, in those parishes which have adopted the stat. 1 & 2 Will. 4, c. 60, they have to make out and publish yearly a list of the estates, charities, and bequests belonging to such parishes, with the rental of each, and the application thereof. By certain statutes recently passed, it is provided that any part or parts of a parish may be constituted a separate *district* for spiritual purposes, and that any parish may also be divided into two or more distinct and separate parishes for all ecclesiastical purposes whatsoever.

II. *The Civil Division.*—The civil division of the territory of England is into *counties*, of those counties into *hundreds*, and those hundreds into *tithings* or *towns*.

(a) *Tithings* were so called because *ten* freeholders with their families composed one. Tithings, towns or vills, have all the same meaning in law: the word town or vill is now a generic term denoting several species and varieties. In this sense towns are distinguished as being (i) corporate or not corporate (a *corporate* town is one in which the townsmen form a society for its good government); (ii) market towns or not market towns; (iii) divided into cities, boroughs and common towns, or not so divided. *Cities* are certain towns of note and importance, which, as a matter of fact, are, or have been, sees of bishops, but there seems no necessary connection between a city and a see. A *borough* is a city or other town that sends burgesses to parliament: the term is used in other senses in various acts of parliament. A *demi-vill* consisted of five freemen and their families. *Hamlets* are small appendages to towns, and are such as consisted of less than five freemen. They are sometimes under the same administration as the town itself, and sometimes governed by separate officers.

(b) *Hundreds* were so called because they consisted of one hundred families each, that is, ten tithings.

(c) A *county* or *shire* is made up of an indefinite number of hundreds. The term "shire" is a Saxon word, meaning a "division."

The original division of the realm into counties was probably made with the view of facilitating the administration of justice, and such division is at the present time materially connected with the course of judicial proceedings. In connection with the distribution into counties another important object is their representation in parliament; for every county sends to the House of Commons its own members, called "knights of the shire," who represent their respective counties. The division into counties is also of practical effect and importance for the object of local taxation.

*Counties Palatine.*—Three counties, Chester, Durham, and Lancaster, are counties palatine. These counties are so called *à palatio*, because their owners had formerly *jura regalia*, as fully as the king in his palace. They might pardon treasons, murders and felonies; they appointed all judges and justices of the peace, and writs and indictments ran in their names as in other counties in the king's; and all offences were said to be done against their peace and not, as in other places, *contra pacem regis*. None of the counties palatine now remain in the hands of a subject.

*Counties Corporate*, otherwise called counties of cities or towns. These are certain cities and towns, with more or less territory annexed, to which out of special favour and grace the kings of England have granted the privilege of being counties of themselves, and of not being comprised in any other county, but to be governed by their own officers and their own legislators. Although counties corporate have in general no share in voting for members of parliament to represent those counties in which they are locally situate, thirteen of the number are now included within their respective counties so far as regards the right of election for knights of the shire.

## BOOK I.—OF PERSONAL RIGHTS.

### REMARKS.

The laws of England exist not only to enforce *rights*, but also to redress *wrongs*.

*Rights* are divided into—First. *Personal Rights*, *i. e.* those rights

which protect a man's own person ; secondly, *Rights of Property*, i. e. rights relating to his dominion over the external and sensible things by which he is surrounded ; thirdly, *Rights considered with regard to a man's private relations as a member of a family* ; and, fourthly, *Public Rights*, i. e. rights considered with regard to a man's social state or his condition as a member of the community.

*Wrongs* are also subdivided into *civil injuries* and *crimes* ; but as these matters are treated of fully in a subsequent volume, it is not necessary to consider them at present.

Personal rights consist of (1) the right of *personal security*, and (2) the right of *personal liberty*.

The law protects a man's Personal Security, by preventing any one from interfering with his enjoyment of his *life*, his *limbs*, his *health*, and his *reputation*.

A man's life and limbs (but by the term "limbs" you will understand only such of his members as he would or might use for fighting—such as a hand or finger, arm, foot, eye, or front tooth, but not an ear or a grinder, for a man might equally well defend himself without as with these latter, whereas the loss of any one of the former would, without doubt, deprive him of a means of defence) are deemed so valuable in the eye of the law that, in order to protect them, a man may even kill another without incurring any penalty. So, again, if a man is induced to sign a deed to protect his life or fighting members, the deed will have no binding effect, but may be avoided by him. The deed in this case would be set aside because obtained by *duress per minas*, as it is technically called. Where, however, the threat is simply to beat or assault the man, or burn down his house if he do not execute the deed, the deed could not be avoided, although the person executing it would have his remedy for damages—a remedy which the law considers wholly insufficient to compensate for any loss of life or limb.

These personal rights are protected as long as a man lives.

A man's life may legally come to an end not only by his *natural* death, but also by his *civil* death. This latter death formerly occurred when a man did any of the following things:—(a) When he entered into a monastery ; (b) when he abjured the realm ; (c) when he became attainted or outlawed. In the two first cases his rights were absolutely lost, but these acts on a man's part have for a long time—viz. since the Reformation as to entering into a

monastery, and since the passing of 21 Jac. 1, c. 28, as to abjuring the realm, and since 33 & 34 Vict. c. 23, as to becoming attainted—ceased to operate as civil death, which only now occurs in the last case mentioned, namely, on outlawry, and this can only arise in connection with criminal proceedings.

The law not only protects a man's *personal security*, but also his *personal liberty*, in giving him the right, and taking care that no one interferes with his right, of going where he pleases, so long as he obeys the law, and is not placed under any restraint by the law. To protect this right of free locomotion and liberty various acts of parliament have been passed, and notably the Magna Charta, the Petition of Right, and the Habeas Corpus Act, the provisions of which you must carefully notice.

Any confinement against a man's will amounts to an infringement of a man's natural rights to personal liberty; and if such confinement takes place unlawfully, that is, otherwise than by due process of law, the person confined has his remedy for damages against the party confining him; and if when he was so illegally confined he was induced to execute a bond or other instrument to secure his release, such bond could be avoided on the ground that it was obtained, to speak technically, under *duress of imprisonment*.

This protection to personal liberty is carried to such an extent by our law, that although under certain circumstances a debtor who is about to leave the country for the supposed intention of evading payment of the debt may be stopped, yet no man can be sent *out* of England—not even to Scotland, Ireland, or the Channel Isles—against his will, and this although he is a criminal, and the sending abroad might be intended as a punishment for his crime, unless the legislature by express enactment has authorized the banishment.

You must now work out from memory, in the manner suggested in the Introduction, the following questions:—

#### TEST PAPER TO WORK OUT.

1. Explain the term "laws," and distinguish between (a) the revealed and the natural law; (b) the civil and canon law; (c) the common and statute law.
2. Into what three kinds is the common law of England distin-

guishable? Explain the difference between *general* and *particular* customs.

3. What are the rules for determining the legality or otherwise of a custom?

4. Customs must be proved to have existed "time out of mind." Explain this phrase, and show what exceptions have been created to the rule by 2 & 3 Will. 4, c. 71.

5. With regard to statutes, distinguish between (a) *nova statuta* and *vetera statuta*; (b) local and personal statutes; (c) public and private statutes; (d) enabling and disabling statutes.

6. In whose reign and by what statute was Wales annexed to England and made subject to English laws?

7. What were Poynings' laws?

8. Into what two divisions is the territory of England divided, and how are these divisions again sub-divided?

## Second Week's Work.

### BOOK II.—PART I.

#### REMARKS ON PROPERTY GENERALLY—

##### CHAPTER I.—*Of the Divisions of Things Real.*

„ II.—*Of Tenures.*

„ III.—*Of Freehold Estates of Inheritance.*

„ IV.—*Of Freehold Estates not of Inheritance.*

„ V.—*Of Estates less than Freeholds.*

„ VI.—*Of Estates upon Condition.*

„ VII.—*Of Estates in Possession, Reversion and Remainder.*

From a careful perusal of the Introduction to Book II. you will find no difficulty—so interestingly and intelligibly is it written—in understanding how lands and moveables gradually became everywhere permanently appropriated, and how the right of ownership in property being secured, the right to transfer it by deed and other acts *inter vivos*, and in course of time by will also, followed; and how

the right to property when once acquired has been from time to time protected by the municipal law from being infringed. Having acquired this knowledge, you must pass on to—

### PART I. OF BOOK II.,

which treats of *Things Real*, that is, of things of a substantial and immoveable nature, and of rights issuing out of them, as distinguished from *Things Personal*, or things of a moveable nature, as money and goods, and rights connected with them, the consideration of which is left to Part II. of Book II. of the Commentaries.

#### Chapter I.—Of the Divisions of Things Real.

Hereon you must notice—

- I. Of what Things Real consist.
- II. What the terms “land,” “tenement,” and “hereditament” respectively include. Which is the most comprehensive of these terms.
- III. Why it is that by a conveyance of “a piece of water” only the right to fish in that water passes, and not the soil itself.
- IV. What the meaning of the maxim, *Cujus est solum ejus est usque ad cælum (et ad inferos)*, is. (See Appendix A.)
- V. How “corporeal” hereditaments differ from “incorporeal” hereditaments.

#### Chapter II.—Of Tenures.

##### REMARKS.

This is a difficult, and at the same time an important Chapter. All lands have been by our laws, since, at any rate, the time of the Norman Conquest, and still are, held either mediately or immediately of the sovereign, who is the lord of all the land in the kingdom. The owner of the land is called the *tenant*, the holding is called a *tenement*, and the manner of the holding—or the services subject to which the lands are held—a *tenure*. Where lands were held under the feudal system directly of the king, the tenants were called tenants *in capite*, and when held under one lord immediately, and under another mediately, the chief lord (or the sovereign) was called

the lord *paramount*, and the inferior lord the *mesne* lord. Thus, supposing the king granted lands to A., and then A. granted a part of them to B., here B. held of A., and A. of the king. The king was the chief lord or lord *paramount*, A. was his tenant, and at the same time B.'s lord—in other words, A. was a *mesne* lord, and B. was called tenant *paravail*.

Tenures have their origin under the feudal system; which, although gradually introduced into Europe during the third, fourth and fifth centuries, did not prevail in England until William the Conqueror's reign; for under the Saxon rule, while lands were not strictly *allodial*, that is, held of no superior and free from all service, yet they were not burdened with the heavy services which existed in countries where the feudal system prevailed.

The feudal system, having been introduced into this country, took firm root, and although in the days of our earlier kings, when the times were times of violence and insecurity, it was found beneficial both to the lord and the tenant;—to the lord because it enabled him at any time of necessity to call together a band of military retainers; to the tenant because it gave him the protection of a powerful superior;—yet when the services, which were at first only of a military nature, were commuted into money payments, and the lords from time to time exacted more and more from their tenants, the system became burdensome, and gradually gave way, and was at last abolished by a statute passed in Charles II.'s reign, viz., 12 Car. 2, c. 24.

The principal tenure existing under the feudal system was that of *knight's service*—a tenure of a strictly military nature, and the one by which the greater part of the land in this country was held until the passing of the statute just mentioned. In order to constitute a tenure by *knight's service*, the king must have granted to a tenant a *knight's fee*, i. e. a tenement estimated in quantity at twelve ploughlands, and amounting in value to 20*l.* per annum. A tenant holding by knight's service, held the lands subject to many claims and rights of the lord, of which, among others, may be mentioned:—

(1.) *Wardship*—i. e. the right of the lord to the custody of the body of an infant tenant, until the age of twenty-one if a male, and fourteen if a female, and during this period to receive for his own benefit the rents and profits of their lands.

(2.) *Knighthood*—i. e. the lord's right to compel the heir, when he

came of age, to receive the order of knighthood or pay a fine. This right was abolished in Charles I.'s reign (16 Car. 1, c. 20).

(3.) *Marriage*—*i. e.* the right of the lord of marrying the infant heir (whether male or female) to anyone he chose; and if the infant refused to enter into the proposed marriage, he or she forfeited to the lord the value of the marriage, *i. e.* as much as he would have received from the person proposing to marry his ward.

(4.) *Aids*—*i. e.* the right of the lord to demand money payments from the tenant upon certain events, *e. g.*, for ransoming the lord's person if he was taken prisoner, for making the lord's eldest son a knight, and for marrying his daughter. These were the only aids which could be legally demanded, but they were often demanded for a fourth purpose, *viz.*, for paying the lord's debts.

(5.) *Reliefs*—*i. e.* the right of the lord to receive payments from the heir on taking possession of his fief. The amount was originally arbitrary at the lord's will, but he was found to demand so much that the amount was fixed in Henry II.'s reign at 100s.

(6.) *Fines*—*i. e.* the right of the lord to receive a sum of money when the tenant alienated his fief.

(7.) The liability of attending the lord to the war. This was indeed the condition on which the grants were made. The attendance was for forty days for every knight's fee, but was eventually commuted into a mere money payment, which was called *escuage*.

There were also besides the above, *homage*, *fealty*, *forfeiture*, and *escheat*, connected with this tenure of knight's service.

Other tenures partaking of the nature of knight's service were the tenures by (a) *grand serjeanty*, whereby the tenant was bound to do some honorary service, as to carry his lord's sword. The tenants in grand serjeanty always held of the king, and paid no aids or scutage, and only one year's value of land as relief; and (b) *cornage*, a species of grand serjeanty, whereby the tenant held his lands on the condition that he should wind a horn, when the Scots or other enemies entered the land, to give warning of such entry.

Thus much with regard to knight service tenure. The other tenures which existed under the feudal system were, (1) *free socage* (and under this tenure must be included the tenures of (a) *gavelkind*, (b) *burgage tenure*, and (c) *petit serjeanty*); (2) *villanage* or *copyhold*, including the tenures of (a) *ancient demesne*, and (b) *customary freehold*; and (3) *frankalmoin*.



A few words as to each of these tenures, and first, as to *free socage tenure*. Many derivations of the term socage are given; of them the best seems to be *socna*, signifying a franchise or liberty, for this tenure was characterized for its freedom, the services, while much the same as those under knight's service, being of a much lighter and more certain, though of a less honourable, nature; thus, the relief due was one year's value of the land, and the wardship of the infant tenant belonged not to the lord, but to the infant's next friend, who might be anybody incapable of inheriting the infant's land, and who was bound to account to the ward at his majority for the rents of the estate. The incidents, *aids*, *finer on alienation* and *primer seisin*, formerly connected with this tenure, were abolished by 12 Car. 2, c. 24.

*Gavelkind tenure* is a kind of socage tenure, prevailing chiefly in Kent, and is a relict of the Saxon law, the term being apparently derived from the Saxon words "Gif eal cyn," meaning given to all the children; one of the chief incidents of this tenure being that on the death of the ancestor the inheritance went, and still goes, to the sons (brothers, &c.), equally as coparceners, instead of to the eldest son. Other incidents are—

- (i) An infant tenant can, by *feoffment*, dispose of the lands at fifteen.
- (ii) There never was any escheat to the lord on the tenant being attainted for felony, the maxim being "the father to the bough, the son to the plough."
- (iii) The curtesy and dower are different.
- (iv) The lands were always alienable by will.

*Burgage tenure* is another kind of socage tenure, existing in a few ancient cities and boroughs (hence sometimes called *town socage*), and having several peculiar customs, one of which, and the best known, is the custom of *Borough English*, by which the youngest son is heir to his father to the exclusion of all the other sons. A similar custom under the name of *mercheta* formerly existed in Scotland. The reason given by Littleton for this is because the younger son is not so capable as the rest of his brethren of supporting himself. Other and more curious reasons are given by different writers. In some boroughs the widow's dower extended to the whole of her husband's lands, while in others the right of disposing of the lands by will was permitted at a time when such a disposition was generally not allowed.

*Petit serjeanty* is also considered as a species of socage tenure, because the services rendered for the lands held by it were of a certain nature, as yielding to the king or lord yearly a bow or a sword.

The great difference, you will observe, between the strict military tenure of knight's service (including that of grand serjeanty and of cornage) and the tenure of free socage (including Gavelkind, Burgage and Petit Serjeanty), was that the services to be rendered in respect of the former were of an uncertain though honourable character, while those of the latter were of a certain and free kind. The tenures, however, resembled each other in many ways, and, among others, in that (1) they were conferred in the same way, namely, (a) by words of donation, *dedi et concessi*, (b) by investiture, (c) by oath of fealty, which the tenant took, doing homage to the lord at the same time; (2) they were both transferred from one owner to another by delivering corporeal possession of the land; (3) the law of primogeniture (except with regard to Gavelkind and Borough English lands) applied equally to both.

By statute before referred to (12 Car. 2, c. 24) all military tenures except grand serjeanty were abolished and turned into *Free and Common Socage*, or as it has been for a long time called *Freehold* tenure, the principal tenure of lands in this country at the present time. You will remember that Gavelkind, Borough English, and Petit Serjeanty tenures, being customs only of socage tenure, were not affected by the statute of Charles and remain to this day, and that the statute expressly excepts the tenures of *Villénage* (or copyhold) and *Frankalmoign*, tenures which it is now necessary to explain shortly.

The tenure of Villénage was originated by the feudal lords creating manors by a means of conveyance known as subinfeudation. The lord kept part of the fief or inheritance for his own use, which was called the lord's *demesne*, and granted out part to freeholders for certain purposes, who, as distinguished from the copyholders, are still to be met with in manors; of his demesne lands, again, he kept part for his own private use, and of the remainder his *villeins* had some, and the rest formed the lord's waste, *i.e.* the uncultivated ground used for roads and common of pasture for the lord and his tenants. These villeins were the peasantry in the early days, who were in a state of almost absolute slavery, being not only divested of all property, but of all civil rights. They were divided into *villeins*

*regardant* and *villeins in gross*. The former were the original and proper villeins, who belonged to the manor; the latter were such as had been transferred from one lord to another, and belonged to the person of the lord, and were not attached to the manor. These villeins, to whom the lands of a manor were so granted, originally held such lands entirely at the lord's will for some base service, and any land which the villein purchased the lord had the right to seize. Their position, however, gradually improved, the lords making numerous concessions to them, and their number continually decreased by the practice of manumission or enfranchisement, whereby they obtained their liberty, and their property in the land became distinct and recognized by the law; and although they still held nominally at the will of the lord, the will was regulated by the custom of the manor; and as long as the tenants—the former villeins—conformed to such custom, the lord could not eject them from their land. The customs were preserved and evidenced by the rolls or books of each manor, in which the admissions of the tenants were recorded; and thus the tenants were, in course of time, called tenants by *copy of court roll*, and the tenure of villenage changed its name, and has been since known as *copyhold*. Copyhold tenure then, as it exists at the present day, applies to those lands which are technically held at the will of the lord of some manor, according to the custom of that manor and by copy of court roll. The peculiar incidents or services connected with this tenure are quit rents, fines, heriots, escheat and forfeiture. The lord is entitled to the mines and minerals under, and to the timber growing upon, the lands, but he cannot enter to dig for the former, or to cut the latter, except by the tenant's consent.

In connection with the tenure of copyholds the tenures of ancient demesne and customary freehold must be considered.

*Ancient demesne* was formerly known as *villein socage* or *privileged socage*. This tenure exists in those manors which in William the Conqueror's time belonged to the Crown. The villeins of these manors became emancipated earlier than villeins in other manors, and had many important privileges not applying to villeins generally, the principal of which were the right to sue and be sued in their own Manor Court, and the freedom from tolls and taxes. The jurisdiction of all Manor Courts has now, however, been transferred to the ordinary courts of law by 3 & 4 Will. 4, c. 74, and this tenure is of small practical importance.

*Customary freehold.* This tenure much resembles the ordinary tenure of copyhold, except that the lands are not held even technically at the lord's will; it prevails chiefly in the north of England.

*Frankalmoign* is a tenure of a spiritual nature, whereby a religious corporation, sole or aggregate, holds lands to them and their successors for ever, for which no other service is required than prayers and other religious exercises for the good of the donor's soul. The tenants were, however, obliged to perform the service known as the *trinoda necessitas*, or three-knotted necessity of repairing the highways, building castles, and expelling invaders.

Another tenure abolished by 12 Car. 2, c. 24, was tenure by Divine Service, where the services were defined, *e. g.*, to sing so many masses. If the services were neglected, the lord might distrain.

### Chapter III.—Of Freehold Estates of Inheritance.

#### REMARKS.

This is an extremely important Chapter.

Bearing in mind the meaning put by the author of the Commentaries on the words "estate" and "freehold," freehold estates are divided into—(1) Freehold of inheritance, consisting of fee simple and fee tail estates; and (2) Freeholds not of inheritance, consisting of life estates.

And, first, of *Fee simple estates*. Fee simple estates are subdivided into—(a) Fee simple absolute; (b) Base or qualified fees; (c) Conditional fees.

(a) A *Fee simple absolute* is one which has no condition whatever attached to it, and is the largest estate a man can have in lands by our law, and descends to the tenant's heirs, lineal and collateral, for ever. The owner has full powers of alienation over it, either by deed or by his will.

Fee simple estates may be created by deed or will; if by deed, the estate must formerly have been limited to the grantee and his *heirs*, otherwise only a life estate would pass, for it was a rule that in a deed no word could supply the place of this word *heirs*, and a limitation by deed "to a man and his assigns for ever," or to him in fee simple, or other similar limitation not containing the word "*heirs*," would give him a life estate only; but in a will the rule was different, for while deeds were construed strictly, a liberal construction in accordance with the supposed intention of the testator has always been

adopted with regard to wills; and although before the Wills Act, 1837 (1 Vict. c. 26), some words were necessary to show the testator's intention to give more than a life estate—such as those first mentioned would have been amply sufficient—the word “heirs” was never necessary, and now by this Act no words whatever of limitation are required, and a gift of the property to the donee simply will pass to him all the interest the testator had in the premises in the absence of a contrary intention; but to prevent any chance of dispute in practice it is always desirable to mark out the donee's interest under a will in the same way as in a deed by making use of the proper word “heirs” if it is desired to give him a fee simple, but with regard to deeds, however, the strict feudal rule remained in force until 1st January, 1882, and no other word than “heirs” could confer a fee simple by deed; but now by the Conveyancing Act, 1881, with regard to deeds executed after the above date a fee simple may be created by the words “in fee simple” being inserted.

(b) *Base or qualified fees.* These are fees subject to extinction upon the happening of an event, as a gift of lands to A. and his heirs, *tenants of the Manor of Dale*—here had the words italicised not been inserted, A. would have had a fee simple absolute, but the insertion of these words gives him a qualified fee, that is, a fee only as long as he and his heirs remain tenants of the Manor of Dale, and immediately they cease to be such tenants the estate is lost. The term base fee is, however, now generally used to denote that estate which a tenant in tail formerly acquired by levying a fine, and which he now acquires by executing a disentailing assurance without the protector's consent, on which I shall touch presently.

(c) *Conditional fees.* These estates are rarely met with at the present day, only occurring when copyholds or personal annuities are limited to a man and the heirs of his body. Formerly, that is before the passing of the De Donis statute (13 Edw. 1, c. 1), when lands were limited in this way the grantee did not get, as he would at the present time, an estate tail, but a conditional fee simple estate; that is, he got the right of disposing of the lands as if a fee simple had been given to him, on the condition supposed to be implied in the words used in the grant being performed, that is, on the birth of issue; while, if he did not so dispose of it, on his death, the estate went to the heirs of the body if he had any, and if he had none, reverted to the lord, and did not go to the collateral heirs. This

construction of the Courts defeated the intention of the grantors, and they procured the statute just mentioned to be passed, under the provisions of which originated the other class of estates of inheritance which remain to be considered, viz. :—

*Estates Tail.* These estates originate under the statute De Donis, above referred to, passed in the year 1285. It provided that the will of the donor should be observed *secundum formam in carta doni expressam* (agreeably to the form in the deed of gift expressed), so that tenements given to a man and the heirs of his body should, notwithstanding any alienation by the donee, go to his issue, if any, or, if issue failed, should revert to the donor or his heirs.

After this statute estates granted to a man and the heirs of his body were called estates *tail*, from the French word *tailler*, to *cut*, the estate having been *cut down* by the act, and confined to the heirs of the body strictly.

For about two hundred years this act remained in strict force, and estates tail were wholly inalienable. The inability to deal with these estates proving extremely inconvenient in many ways, the judges, in *Taltarum's Case*, recognized a fictitious and collusive proceeding, known as a recovery, by means of which an estate tail was effectually barred and turned into an estate in fee simple. In course of time another, less expensive, but equally fictitious and collusive, proceeding was recognized for dealing with estates tail. This proceeding was called a *fine*, and had the effect of barring the tenant in tail's issue, but not the rights of the remaindermen or reversioners. In other words, a fine only created a *base fee*, i. e. a fee simple as long as the issue of the tenant in tail continued.

The proceedings in these fictitious actions (which are more fully treated of in a subsequent chapter, see Chap. XIX. *post*), though of a very intricate and expensive nature, continued to be used until the year 1833, when they were abolished by the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74), and in lieu of them it was provided that a tenant in tail might, by executing an ordinary deed (known as a disentailing assurance), and enrolling it in the Court of Chancery within six months of execution, turn the estate tail into an estate in fee simple, the protector's consent being obtained. The first tenant for life is usually the protector, and if the deed is executed without his consent a *base fee* only is created.

An example may perhaps show you the effect of a recovery, a fine,

and a disentailing assurance. Supposing lands are granted by A. to B. and the heirs of his body. Under such a grant, besides B. there are two persons interested, namely, the issue of B. or the heirs of his body, who will, if the estate is left all out, get it on B.'s death, and A. the grantor, who is the owner of the reversion, and hopes to get the estate back in the event of the issue of B. failing at any time.

If B. suffered a recovery, not only were the rights of his issue barred, but the rights of A. were barred also, B. acquiring under the judgment in the recovery action an estate in fee simple.

If, however, instead of suffering a recovery, B. levied a fine, the rights of his issue only were barred and not the rights of A., who would, notwithstanding the fine, be entitled to the reversion in the lands, into whomsoever's hands they might have got, in the event of B.'s issue failing, B. acquiring under the fine a base fee only.

Since 3 & 4 Will. 4, c. 74, an ordinary deed executed by B. and enrolled in Chancery within six months, will give B. the fee simple in the lands, but if his estate tail had been preceded by a life estate, say in favour of C., then C. would be protector and his consent to the deed would be necessary, otherwise B. would acquire a base fee only.

#### POINTS TO NOTE.

- I. The different senses in which the word "*estate*" is used in connection with tenements.
- II. What is meant by a "*freehold*" estate, and how such estates are divided.
- III. What the word inheritance or fee signifies, and what the different kinds of estates of inheritance are.
- IV. The definition of an estate in fee simple.
- V. What the expression "seised in his demesne as of fee" means.
- VI. What led to the passing of the Quia Emptores statute (18 Edw. 1, c. 1), and what the effect of this statute was. To what tenants it did not extend.
- VII. What is meant by the "fee being in abeyance," and what an example of it is.
- VIII. Why it was that, under the feudal system, in granting lands by deed, the word "heirs" was absolutely necessary to give an estate of inheritance, and what the Latin maxim applicable was. How far the feudal rule is affected by the Conveyancing Act, 1881 (see post, p. 27).

- IX. What the different kinds of estates tail are.
- X. What words of limitation in a deed and will respectively must be used to create an estate tail. How far the question is affected by the Conveyancing Act, 1881.
- [N.B.—This statute provides, in deeds executed after the 31st December, 1881, an estate tail may be created by a conveyance to a man “in fee tail,” and an estate in fee simple by a conveyance to a man “in fee simple,” equally as by a conveyance to a man and the heirs of his body, or to a man and his heirs.]
- XI. What estates in *Frank marriage* were.
- XII. For how long the statute De Donis remained in strict force, and what inconveniences resulted from the strict law of entails.
- XIII. What rights were given to tenants in tail with regard to their estates by statute 4 Hen. 7, c. 24 (as explained by 32 Hen. 8, c. 36), and 32 Hen. 8, c. 28.
- XIV. In what year and by what statute fines and recoveries were abolished, and what mode was substituted for barring entailed estates.
- XV. Who, under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), the “protector of the settlement” is, and what the result is if a disentailing assurance under the act is executed without his consent.
- XVI. When estates tail were rendered liable to—(1) forfeiture for treason; (2) payment of debts (a) when the tenant became bankrupt; (b) when judgment was signed against him.
- XVII. What construction was put on 43 Eliz. c. 4, on an appointment to a charitable use made by a tenant in tail.
- XVIII. What powers of leasing entailed estates was given to tenants in tail by 3 & 4 Will. 4, c. 74.
- XIX. What a *quasi entail* is and how barred.

#### Chapter IV.—Freehold Estates not of Inheritance.

##### REMARKS.

Freehold estates not of inheritance consist of life estates, and are either *conventional*, *i. e.* created by act of the parties; or *legal*, *i. e.* created by act of the law.



*Conventional estates for life arise under an express grant for life, or under a general grant without any words of inheritance; and they may be either for a man's own life, for that of another person, or for several lives. If A., entitled to a life estate in property, grant it to B., B. becomes *tenant pur autre vie*, and A. is called the *cestui que vie* (the person for whose life B. holds). Freeholds not of inheritance are conferred in the same way as freeholds of inheritance.*

*Legal estates for life consist of—*

(a) *Estates in tail after possibility of issue extinct*, occurring when two persons are tenants in special tail, and one of them dies before issue has been born, the survivor is called *tenant in tail after possibility of issue extinct*, and his estate partakes more of the nature of a life estate than that of an estate tail. Thus, if lands are limited to A. and the heirs of his body by his wife B., and B. dies without having had issue, A. becomes tenant in tail after possibility of issue extinct.

(b) *Estates by the Curtesy of England*.—An estate to which a man is entitled on the death of his wife in lands of which she was seised in fee. To make such an estate attach the requisites are—(1) a marriage properly entered into, and not put an end to by divorce; (2) actual seisin of the wife; (3) issue born alive capable of inheriting; (4) death of the wife in the husband's lifetime. In gavelkind lands the birth of issue is not necessary to give the husband an estate by the curtesy, but in other lands this birth of issue *alive in the mother's lifetime*, and capable of inheriting the property, is absolutely necessary. When a child is born, the husband is said to be tenant by *curtesy initiate*, and when the wife dies tenant by *curtesy consummate*.

(c) *Estates in Dower*.—The right of a wife on the death of her husband to claim under certain circumstances a third part (in value) of his estates of inheritance, to which any issue she *might* have had (whether she had or not) might have inherited.

Common law dower (*i. e.* the dower of women married before 1334) attaches to all estates of inheritance of which the husband was *solely* seised at any time during coverture. It does not attach to equitable estates.

Where the right has once attached, it has priority over all claims, and cannot be defeated by any conveyance or act of the husband only; and consequently this kind of dower, where it has once attached, becomes a blot on the title. Plans were therefore invented

to *prevent dower attaching*. Out of many methods devised for this purpose the one most usually adopted was of conveying the lands to a purchaser in the following way, namely—to such uses as he should by deed or deeds appoint, and in default of, &c., such appointment to his use for life, and after the determination of his estate in his lifetime to the use of a trustee for him for life, with an ultimate remainder to the use of his heirs and assigns. Under these uses, which are spoken of as *uses to bar dower*, the purchaser never acquired an estate of inheritance in possession, and consequently dower did not attach, while at the same time he could, by exercising his power of appointment, deal with the property as he liked. These uses should still be inserted in a purchase deed where the purchaser was married before the 1st January, 1834, if his wife is alive, but they are useless in other cases.

*Statutory dower*, or dower regulated by 3 & 4 Will. 4, c. 105, applying to persons married after the 1st January, 1834, only attaches to those estates of inheritance of which the husband *died solely seised*, and a mere declaration in any deed or in his will that his widow shall not be entitled to dower is sufficient to bar her right to dower; but this declaration should never be inserted, as the husband can dispose of his lands by deed or will without her concurrence, and his grantee or devisee holds the lands free from all claims in respect of dower, and statutory dower consequently only arises under an intestacy, and the widow is entitled to at least as much consideration as the heir. This dower attaches to equitable estates.

The widow to be entitled to dower must be over nine years of age, and must have been the actual wife of the deceased, who must not have been a traitor.

Other kinds of dower, which are now unknown, are, (1) dower by particular custom, (2) dower *de la plus belle*, (3) dower *ad ostium ecclesiæ*, (4) *ex assensu patris*.

In addition to barring dower in the way mentioned, it might also be barred by (1) a fine levied or a recovery suffered by the wife, or, since 3 & 4 Will. 4, c. 74, by deed acknowledged by the wife, (2) by the husband being convicted of treason or being divorced from his wife, (3) by jointure. With regard to jointure—that is, a sum of money settled on the wife in lieu of dower—in order that it may effectually bar dower, the following are the requisites:—(1) it must take effect immediately on the husband's death; (2) it must be for

her own life at least; (3) it must be made to the wife herself; (4) it must be made in satisfaction of her whole dower; (5) it must be made before marriage, for if made after marriage (when it is called *equitable jointure*) the wife can elect on the husband's death whether to accept the sum so settled on her or to take to her dower.

All tenants for life, unless specially restrained, are entitled to reasonable estovers or botes, but unless they are tenants for life without impeachment for waste, they must not be guilty either of *voluntary waste*, by cutting timber, pulling down the buildings, opening mines, or doing other acts whereby injury is caused to the inheritance, or of *permissive waste*, i. e., allowing the premises to fall into ruin for want of repair. It is, however, doubtful whether a tenant for life is at the present time responsible for waste which is merely permissive. Tenants for life without impeachment for waste can commit all ordinary waste with impunity; but they must not pull down the family mansion, cut ornamental timber, or plough up any part of the park surrounding the mansion—acts known as *equitable waste*, because formerly restrained only in equity, but now such acts are restrained in all the Divisions of the High Court, sect. 25 of the Judicature Act having provided that a tenant for life without impeachment for waste shall have no *legal* right to commit *equitable waste*.

With regard to rights of leasing possessed by tenants for life (whether *legal* or *conventional*), the provisions of the Settled Estates Act, 1877, must be borne in mind. This act repeals, while it re-enacts with some few alterations and additions, the provisions of the Settled Estates Act, 1856, and Amending Acts. Under the new Act (40 & 41 Vict. c. 18) all tenants for life may grant leases of any part of their estates (except the mansion and the demesnes) for twenty-one years as to English estates, and thirty-five years as to Irish estates, provided the following conditions be complied with, viz. :—

- (i.) The lease be by deed;
- (ii.) The best rent be reserved;
- (iii.) The lease be made to take effect in possession or within one year, the lessee executing a counterpart;
- (iv.) All the usual covenants be reserved;
- (v.) A proviso for re-entry, on non-payment of the rent for a period of twenty-eight days after it becomes due, be inserted.

These leases for twenty-one years may be granted without any leave, when the life estate arises under a settlement dated after 1st November, 1856. With the leave of the Chancery Division of the High Court, the following leases can be granted, *whatever the date of the settlement*, viz., agricultural leases for twenty-one years in England, and thirty-five years in Ireland; mining leases and leases of easements for forty years; repairing leases for sixty years; and building leases for ninety-nine years; and for longer periods where the custom of the country admits it, except agricultural leases, which cannot be made for longer than twenty-one years.

## POINTS TO NOTE.

- I. Why it is that a grant for life generally without words signifying whether it is intended that the estate should continue during the grantee or grantor's life, is construed to be an estate for the life of the grantee.
- II. Why grants are expressed to be for the grantee's *natural* life, and not for his life generally.
- III. What the meaning of the terms (a) estovers, (b) botes, (c) emblements is.
- IV. What provisions relating to emblements are contained in 14 & 15 Vict. c. 25.
- V. What provisions, with regard to the apportionment of rent, are contained in 11 Geo. 2, c. 19; 4 & 5 Will, 4, c. 22, and 33 & 34 Vict. c. 35.
- VI. Who a "tenant in tail after possibility of issue extinct" is; why this definition exactly marks him out, and what rights over the estate he possesses.
- VII. What "dower" is, and whence the term is derived. How English dower differs from the Roman "dos."
- VIII. Who may become tenants in dower, and what the meaning of the maxim *Ubi nullum matrimonium, ibi nulla dos* is (see Appendix A.)
- IX. Whether widows of attainted felons or traitors can be endowed (see 13 Edw. 1, st. 1, c. 34; 1 Edw. 4, c. 12; 5 & 6 Edw. 6, c. 11, s. 13).

- X. Out of what estates dower can be claimed, and how in this respect the dower of women married before 1st January, 1834, differs from that of women married since that date.
- XI. What the five species of dower formerly were, and how dower *ex assensu patris* differed from dower *ad ostium ecclesiæ*.
- XII. What the term "quarantine" in connection with dower means.
- XIII. The various ways in which dower may be barred.
- XIV. What "jointure" is, and how defined by Sir Edward Coke, and what enactments respecting it were contained in the Statute of Uses.
- XV. In what respects jointresses have advantages over tenants in dower, and *vice versâ*.
- XVI. Why it is desirable on a purchase of lands, if the purchaser was married before 1834 and his wife is still living, that the conveyance should be made *to uses to bar dower*, and why if married since this date it is unnecessary.
- XVII. In what respects the Dower Act, 1833 (3 & 4 Will. 4, c. 105), curtailed, and in what respects it enlarged, the rights of widows with regard to their dower.
- XVIII. Of what nature the dower and curtesy in gavelkind lands respectively are.

#### Chapter V.—Of Estates less than Freehold.

##### REMARKS.

Estates less than freehold are either *for years* (which includes a yearly tenancy), *at will*, or *by sufferance*, and form part of the owner's personal estate, and are commonly called "Chattels Real." You may find some difficulty in understanding why leases for a term of years (however long) in lands should be personal property, and therefore less valuable than a life estate, and some explanation is desirable.

You will remember that the reason that lands, tenements and other immoveable property were termed *real* property, was because if the owner of them were turned out of possession he could recover the *real* land, &c., itself; and, on the other hand, that the term *personal* property was applied to goods, chattels and other moveable property, because if the owner was deprived of them, he could not get back the goods, &c., themselves, but he had a remedy only against the *person*

who took them away. Now in early days a lessee of lands was usually only a sort of bailiff, and had no certain interest in the land, and if he was ejected by his landlord, he had no remedy by which he could get back the *real* land,—his only remedy was against his landlord for damages; and consequently leases, although they were interests in land, were deemed *personal* estate; and when, in course of time, the interest of the lessee in the lands leased to him became a beneficial one, and he could, if he was wrongfully evicted, get back the lands for the remainder of his term, no change occurred; and at the present time a man who is possessed of a term of years in land, however long and however valuable—*e. g.* a term of 999 years at a peppercorn rent—has only a chattel interest, which on his death intestate will not go to his heir, but will devolve on his administrator, and by him be distributable among his next of kin.

With regard to leases you must not forget, that although leases are for a shorter term than three years, they must not only be in writing, under the Statute of Frauds, but by deed, under 8 & 9 Vict. c. 106, *unless* the rent reserved in them be two-thirds of a rack or full rent, and this applies of course to tenancies from year to year.

*Tenancies from year to year* are either created in express terms or implied from the payment of rent yearly, half-yearly or quarterly. On the death of the tenant, his executor or administrator becomes tenant, and the tenancy goes on until it is determined by either landlord or tenant giving to the other half a year's notice, or a year's notice with regard to tenancies coming within the provisions of the Agricultural Holdings Act, 1875, to quit; but the notice must in all cases be given half a year or a year, as the case may be, before the quarter day on which the tenancy began.

*Estates at will* are those held at the will of either party, and can be determined suddenly at any time by either landlord or tenant; but if the landlord determines such a tenancy, the tenant can claim emblements. The death of either party, or any act inconsistent with the tenancy, *e. g.*, the tenant committing waste, also determines it.

On account of the uncertain nature of these tenancies, the Courts will, whenever they can, convert them into tenancies from year to year.

*Estates at sufferance* arise where a tenant holds over after the expiration of his tenancy. In such a case, unless he be tenant of the king, when he is deemed an intruder, he is called a tenant at suffer-

ance. If the landlord accept rent yearly, half-yearly, or quarterly from such a tenant, he becomes a tenant from year to year.

#### POINTS TO NOTE.

- I. The derivation and meaning of the term *chattel real*.
- II. How chattels real differ from freeholds.
- III. Why it is that a lease for as many years as I shall name is a good lease, whereas a lease for as many years as I shall live is void altogether, and what the Latin maxim is.
- IV. What the difference (if any) is between a demise for *twelve months* and a demise for a *twelvemonth*.
- V. What an *interesse termini* is.
- VI. What rights of committing voluntary waste or allowing permissive waste tenants at will, from year to year, and for a term of years have.
- VII. What a tenancy at sufferance is.
- VIII. What remedy a landlord formerly had against a tenant at sufferance, and what additional rights have been given to him by 4 Geo. 2, c. 28, and 11 Geo. 2, c. 19.
- IX. When proceedings can be taken (a) before justices of the peace, (b) before a county court judge, to recover the possession of property from tenants at sufferance (see 1 & 2 Vict. c. 74, and 19 & 20 Vict. c. 108, s. 50).

#### Chapter VI.—Of Estates upon Condition.

##### POINTS TO NOTE.

- I. Into what sorts estates upon condition are divided.
- II. Under what circumstances estates upon condition are *implied* in law. (Two or three examples should be remembered.)
- III. Of what two kinds estates upon a condition in deed are.
- IV. What the difference between estates upon condition *subsequent* and *precedent* is.
- V. How estates upon *condition subsequent* differ from *conditional limitation*.
- VI. Whether or not in all or any cases or case where there is a breach of a condition subsequent it is necessary for the lessor to enter in order to avoid the estate.

- VII. Supposing A. grants to B. an estate for a term of years subject to the payment of an annual rent, with a condition of re-entry if the rent is not duly paid, whether at common law A. could assign the benefit of such condition to a third person; and whether he could have done so had the estate been created by way of conditional limitation, viz. to B. for a term of years or *until* he neglected to pay the rent reserved; and how far the question is affected by 32 Hen. 8, c. 34.
- VIII. What the effect is with regard to (1) a condition precedent; (2) a condition subsequent where the condition is impossible, illegal or repugnant.
- IX. What the term "mortgage" signifies, and how a *vivum vadium* differs from a *mortuum vadium*.
- X. The different lights in which a mortgage is regarded at law and in equity.
- XI. The meaning of the terms "equity of redemption" and "foreclosure."
- XII. The time within which actions to redeem and foreclose a mortgaged estate must now be brought under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57; see also table given post, Book V. Ch. X.)
- XIII. What rights a mortgagee has over the mortgaged estate at common law, and what additional rights were conferred on him by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).  
 [N.B.—This act gives to mortgagees a power of sale, a power to insure, to appoint a receiver, and to fell timber when, the mortgage deed is dated after 31st December, 1881 (see post, p. 100).]
- XIV. What *statutes merchant* and *statutes staple* are, and why they have fallen into disuse.
- XV. What an estate by *elegit* is, by what statute created, and why so called; and what additional rights have been conferred on tenants by *elegit* by statutes 13 Edw. 1 (*De Mercatoribus*); 29 Car. 2, c. 3; and 1 & 2 Vict. c. 110.
- XVI. Why it is that tenants by *elegit*, *statute merchant* and *statute staple* have chattel interests only.



## Chapter VII.—Of Estates in Possession, Reversion, and Remainder.

## REMARKS.

This is a very important, as well as a very difficult, chapter.

As to the time of their enjoyment, estates are either *in possession*, *i. e.* the tenant is entitled to the actual permanency of the profits (it is not necessary that the tenant should be actually in possession, but he must have the immediate right of entry on the lands), or *in expectancy*, *i. e.* his right depends on some subsequent circumstance or contingency.

Estates in expectancy are of two kinds, *viz.* *reversions* and *remainders*; and while they remain such, they are incorporeal hereditaments, but when they fall into possession, they become corporeal property.

Remainders and reversions are the residue of a larger estate after a smaller estate has been granted out. If such residue is not granted away by the grantor, it remains in him, and is called his *reversion*, from the fact of the estate reverting back to him on the determination of the smaller estate; but if such residue is conveyed away by the grantor, at the same time as the particular estate is created, and by the same deed, it changes its name, and is then known as a *remainder*. Remainders thus arise by act of the parties, being created by express grant, whereas reversions arise by operation of law.

Remainders are of two kinds, *vested* and *contingent*. Vested remainders, or remainders *executed*, as they are called, arise where the reversion is limited to a living person to vest in him on a certain event. Thus, a grant to A. for life, remainder in fee to B. (a living person), gives B. a vested remainder. B.'s estate is said to be vested, because it is ready to take effect immediately A., who is the owner of the *particular estate*, dies. Supposing, however, the grant had been to A. for life, with remainder to B.'s son, who was not at the time of the grant born, the remainder would be a contingent one, it not being ready from its commencement to come into possession immediately A.'s estate determines.

Contingent remainders, or remainders *executory*, as they are sometimes called, are those which are limited to an uncertain person, or upon an uncertain event.

The rules to be observed with regard to all remainders, vested as well as contingent, are—

- (1.) There must be some particular estate preceding them.

- (2.) The remainder must pass out of the grantor at the time of the creation of the particular estate. Thus, if A., seised in fee, grants B. a life estate by one instrument, and by another instrument subsequently executed he grants away his reversion to C., C.'s estate is not a remainder, but only a reversion.
- (3.) They must be made to take effect in possession immediately the particular estate determines. (This rule, however, is now subject to the provisions of the Contingent Remainders Act, 1877; see post, p. 99.)

The two following rules have application to contingent remainders only :—

- (1.) If the remainder amount to a freehold, the estate preceding them must be an estate of freehold, otherwise the remainder will be void. (Thus, in the example of a contingent remainder before given, had the estate limited to A. been for a term of years (however long), as a term of years is not a freehold, the remainder to B.'s son would be void, the remainder being of a freehold estate, and therefore requiring a particular estate of freehold to support it.)
- (2.) Every contingent remainder must become vested either during the continuance of the particular estate, or *eo instanti* that it determines.

(N.B.—This rule is now subject to an important exception created by the Contingent Remainders Act, 1877; see post, p. 99.)

A third rule with regard to contingent remainders might be added, namely, that the remainder will be void if the uncertain event, on the happening of which it is to take effect, is of an illegal or immoral nature. Thus, if a limitation is made to A. for life, with remainder to B., if at A.'s death he shall have an illegitimate son, or be cohabiting with C., the remainder will be void as being *contra bonos mores*, and therefore against the policy of the law.

In connection with the law of contingent remainders, the rule in the celebrated *Shelley's case* must be remembered.

To explain this rule. Supposing property is given by deed or will to A. for life, followed either immediately or mediately (*i. e.*, with some other estate intervening) by a remainder to his heirs or the heirs of his body, A. does not, as might be supposed, take an estate for life only, and his heir an estate in fee simple or fee tail, but the

inheritance passes to A. just as if the gift had been to him and his heirs or the heirs of his body simply, the word "heirs" being used as a word of limitation and marking out A.'s estate, and not as a word of purchase giving anything to the heirs. The origin of the rule is doubtless somewhat obscure, but it seems to have been introduced to protect the feudal lord, who would have lost many feudal incidents had the heir taken by purchase instead of by descent.

#### POINTS TO NOTE.

- I. How an estate *in possession* may be defined.
- II. What the terms *reversion* and *particular estate* mean.
- III. What the usual incidents connected with a reversion are, and how herein reversions differ from remainders.
- IV. When a reversioner is said to be seised of the land "*in his demesne as of fee*," and when "*of his reversion as of fee*," and what the reason for the difference in the expression is.
- V. What effect at common law a feoffment by a tenant for life for a larger interest than he himself possessed,—*e. g.* by his enfeoffing another in fee,—had on the reversion, and what alteration on this point was made by 8 & 9 Vict. c. 106, s. 4.
- VI. What the doctrine of "merger" of estate is, and under what circumstances a particular estate is sunk or lost in the reversion.
- VII. Why it is that (1) if A., the reversioner, marries B., the tenant for life, (2) if A. is tenant in tail, and he purchases the reversion in fee, there is in neither case any merger.
- VIII. What a "remainder" is, how it differs from and how it resembles a reversion, and why it is that a remainder cannot be limited after a fee simple estate has been granted.
- IX. Why it is, that, at common law, if A., seised in fee of lands, convey them to B., to hold to him and his heirs, *from the end of next week*, the conveyance is void; but that if the conveyance had been to C. for three years, with remainder in fee to B., the conveyance would have been good.
- X. Which of the following remainders are good, and why:—(1) a remainder to B. after the determination of an estate at will to A.; (2) a remainder to the survivor of A. and B., who are joint tenants of the particular estate; (3) a remainder to B.

at the expiration of one day after the death of A., the particular tenant for life.

- XI. When a remainderman may be said to be seised "in his demesne."
- XII. Why it is that a grant to A. for life with remainder to B. for life gives B. a vested remainder, although he may never get the estate at all, as he may die before A.
- XIII. What is meant by "a contingent remainder with a double aspect."
- XIV. Under what circumstances a contingent remainder would have become extinguished or failed of effect prior to the year 1845; and what alteration in the law was effected by 8 & 9 Vict. c. 106, passed in that year; in other words, why trustees were before 1845 necessary to protect contingent remainders, and why unnecessary since that year.
- XV. What the expression "uses in strict settlement" means.
- XVI. What the rule in *Shelley's case* is, and what the reason of the rule is supposed to be.
- XVII. What protection has been afforded to remaindermen and reversioners by 6 Anne, c. 18.
- XVIII. What the provisions of 31 Vict. c. 4, as to the sales of reversions are.

#### TEST PAPER TO WORK OUT.

1. Name the various tenures by which lands were held prior to 12 Car. 2, c. 24. Explain the nature of each tenure shortly, and state which of the tenures still exist.
2. Define the terms (a) freehold; (b) fee; (c) donee in tail; (d) quasi entail.
3. What was the object and effect of the *Quia Emptores* and *De Donis* statutes respectively? How can a tenant in tail at the present time acquire (1) an estate in fee simple; (2) an estate in base fee in the entailed land?
4. Explain the terms (a) tenant pur autre vie; (b) waste; (c) estovers; (d) emblements; (e) dower; (f) curtesy; (g) tenant in tail after possibility of issue extinct.

5. What powers as to cutting timber and committing waste has a tenant for life? A. is tenant for life without impeachment for waste, can he commit what waste he pleases?

6. State the various ways in which a chattel real differs from a freehold.

7. What is the difference between (a) estates held on condition subsequent and on condition precedent; (b) conditions subsequent and conditional limitations?

8. Distinguish accurately (a) remainder from reversion; (b) a vested remainder from a contingent remainder.

### Third Week's Work.

#### CHAPTER VIII.—*On Estates in Severalty, Joint Tenancies, and Tenancies in Common.*

- „ IX.—*Of Uses and Trusts.*
- „ X.—*Of Title in general.*
- „ XI.—*Of Title by Descent.*
- „ XII.—*Of Title by Escheat.*
- „ XIII.—*Of Title by Occupancy.*
- „ XIV.—*Of Title by Forfeiture.*
- „ XV.—*Of Title by Alienation in general.*
- „ XVI.—*Of Deeds.*

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#### Chapter VIII.—*On Estates held in Severalty, Joint Tenancy, Tenancy in Common, and Coparcenary.*

##### REMARKS.

The ownership of property is said to be *in severalty* when it is in the possession of one person, and *in community* when it is possessed by several persons.

This latter kind of ownership is divided into several kinds, namely, —(1) *Joint tenancy*; (2) *Coparcenary*; (3) *Tenancy in common*; (4) *Tenancy by entireties*.

Of these, Nos. 1, 3 and 4 apply equally to real and personal property, while No. 2 only exists with regard to real property. A few words as to each of these tenancies; and first as to—

I. *Joint Tenants*—*i. e.* two or more persons obtaining an estate by the

same title at the same time, in equal interests and by entirety, each joint tenant being said to be seised *per my et per tout*; i. e. of a part and of the whole of the estate.

These tenants thus have—must have in fact—the four unities of p-ossession, i-nterest, t-itle, and t-ime of commencement of title. (N.B.—The initial letters spell *Pitt*.)

An important right existing among joint tenants is the right of survivorship, or *jus accrescendi* as it is called; that is, that on the death of one joint tenant his interest survives and passes to the other joint tenants; and this although he may have made a will, or died indebted and left no other property wherewith his debts may be satisfied, the maxim being "*Jus accrescendi præfertur ultimæ voluntati ac oneribus.*" (For a translation see Appendix A.) On account of this right trustees are always made joint tenants.

## II. *Coparceners*—i. e. two or more persons who together form an heir.

These tenants can only claim by descent *either* at common law (and here they are always females or descendants of females), *or* by custom, when they may be males or females, as in Kent, where the custom of gavelkind prevails, on the death of the owner of real property intestate, his lands go not to his eldest son, but to all his sons (if he have any), and, if not, to all his daughters equally, in either case as coparceners. These tenants are not seised *per my et per tout*, and so have no *entirety* of interest, and consequently no right of survivorship between them; nor need their interests vest at the same time, and so they have no unity of time of the commencement of their title.

## III. *Tenants in common*—i. e. several persons who have obtained distinct undivided shares in property either by express grant or by the destruction of an estate in coparcenary or joint tenancy.

The only unity they need have is that of possession.

In creating this kind of tenancy it is better to distinctly state that the tenants are to take in common, although in deeds founded on the Statute of Uses, and in wills, other words are sufficient to create a tenancy in common, such as *equally to be divided between* the tenants, or similar words showing an intention that the tenants should take in distinct shares.

IV. *Tenants by entireties*—i. e. a man and wife who have acquired lands under a conveyance to them in words which, had they not been man and wife, would have made them joint tenants.

The tenants are seised *per tout et non per my*, each tenant having the entirety of the estate, and neither being able to dispose of it without the consent of the other; and if not disposed of during coverture, the survivor takes it. During their joint lives the husband takes the rents and profits.

Nothing more need be added about tenants by entireties; but it seems desirable to draw your attention to some of the leading distinctions between estates held in joint tenancy, coparcenary, and tenancy in common. These distinctions may be conveniently thus stated:—

- (a) Joint tenants and tenants in common take by purchase; coparceners take by descent.
- (b) Joint tenants and coparceners always have a unity of title, while tenants in common need not have.
- (c) Joint tenants, being seised *per my et per tout*, have the right of survivorship between them, whereas tenants in common and coparceners have not, they being seised *per my* only.
- (d) Joint tenancies and tenancies in common can exist in both real and personal property, while coparcenary can only exist in real property.

The question now which will naturally occur to you is, “Can these various co-owners in any way sever the tenancy, and so turn the estate into an estate *in severalty*?”

This severance may be effected in several ways; and first by—

I. Partition; and this may be done *voluntarily* by agreement between the co-owners, and *compulsorily* through the medium of the High Court of Justice (Chancery Division).

With regard to the compulsory partition, coparceners had always the right to compel it,—hence according to Lyttelton they were called coparceners; but joint tenants and tenants in common had no such right until Henry VIII.’s reign. (31 Hen. 8, c. 1; 32 Hen. 8, c. 32; see Appendix B.) Compulsory partition was formerly effected by a writ of partition at law; but the courts of law could only award an actual division of the property into as many shares as there were

co-owners ; thus, if A., B. and C. were joint tenants of a house and small field adjoining and resorted to law for a partition, the judgment would have been that the house and field be divided into three equal parts. In this and similar cases the legal remedy was extremely inconvenient, and equity therefore interfered, and in the case supposed would have ordered one of the parties to take the house and pay a sum of money as *owelty* or *equality* of partition to the others, between whom the field would probably have been divided. In 1833, the jurisdiction at law in partition was abolished by 3 & 4 Will. 4, c. 27; in 1841, equity was allowed to compel partition of copyhold estates by 4 & 5 Vict. c. 35 ; and in 1868, the right to order a sale instead of a partition was given to equity by 31 & 32 Vict. c. 40. By sect. 34 of the Judicature Act, the partition of real estates is specially assigned to the Chancery Division of the High Court.

The voluntary partition by agreement among coparceners is effected in one of the following ways :—(1) An agreement to divide the inheritance into fixed equal parts ; (2) A division of the property by a friend of all the parceners, and a choice of the property by each parcener according to seniority ; (3) A division by the eldest, in which case he or she chooses last ; (4) A division of the property and the tenants casting lots for their shares.

The second mode in which a severance of the co-ownership is effected is by,—

II. The vesting by death, purchase or otherwise of the whole estate in one tenant in severalty.

These two modes apply equally to joint tenants, tenants in common, and coparceners.

The third mode, applying only to joint tenants and coparceners, is,—

III. The alienation by one tenant of his or her share to a third person.

Such alienation converts the estate into a tenancy in common between the alienee and the other joint tenants or coparceners who still hold, as between themselves, as joint tenants or coparceners.

Joint tenants can also sever the tenancy by releasing to each other.



## POINTS TO NOTE.

- I. The four different ways in which estates may be held with respect to the number and connection of their owners.
- II. Why it is that if lands are limited to A. for life with remainder to B. and C. and their heirs, B. and C. take as joint tenants, while if the remainder had been to B. and C.'s son (not born) no joint tenancy would have been created.
- III. What the meaning of the expression *per my et per tout* in connection with joint tenancies is.
- IV. What the reason of the rule that on the death of one joint tenant his interest in the property survives to the others is.
- V. What is the meaning of the maxims, "*Pars illa communis accrescit superstitibus, de personâ in personam, usque ad ultimam superstitem*," "*Jus accrescendi præfertur oneribus*," and "*Jus accrescendi præfertur ultimæ voluntati*." (See Appendix A.)
- VI. A., B. and C. being joint tenants, what effect a conveyance to D. by C. of his interest would have on the tenancy.
- VII. Supposing A., B. and C. are the daughters of D., and A. on her marriage, had received from her father some lands in *frank-marriage*, and B. and C. had received nothing from him. On the death of D. intestate, seised of lands, what the rights of A., B. and C. in respect of such lands would be, and whether their rights would have been the same, supposing the lands had been given to A. otherwise than in *frank-marriage*.
- VIII. Why it was that at common law joint tenancies were favoured rather than tenancies in common.
- IX. Whether a joint tenancy or a tenancy in common is created by a conveyance at common law to two persons of an estate *equally to be divided between them*, and whether it would make any difference if the conveyance had been one operating under the Statute of Uses.
- X. What *cross-remainders* are and how they arise.

## Chapter IX.—Uses and Trusts.

## REMARKS.

The questions which will naturally occur to you when you commence this Chapter are, What is a use? What is a trust?

In the first place, uses and trusts are closely connected, and before the Statute of Uses, passed in Henry VIII.'s reign were almost identical. At the present time the term *trust* is used in two senses ; first, in the sense of a confidence reposed in one person for the benefit of another; and, secondly, in the sense of an interest, it being the equitable or beneficial interest in property as distinguished from the mere legal ownership, which latter is, in real property law, called the *use*.

Thus, under a conveyance of lands to C. to the use of A. in trust for B., A. has the *use* or the legal estate, and is entitled at law to the property, and B. the *trust* or equitable estate, and is entitled in equity to call upon A. to account to him for the rents.

Here the term trust is used in the latter sense referred to, namely, that of an interest, and the trust is considered as of a passive nature. If, however, lands are conveyed to A. to pay the rents to B., here A. has a trust reposed in him, and the term *trust* is used in the former sense referred to, namely, that of a confidence, and the trust is considered as of an *active* nature. Before the Statute of Uses the term *trust* was only used in the sense of a confidence, and the beneficial or equitable interest in land, as distinguished from the legal ownership, was termed a *use*.

With these few preliminary remarks it will now be my task to endeavour to explain to you how it happened, first, that uses were introduced into this country; and, secondly, how they afterwards became denominated *trusts*.

The exigencies of mankind would seem to have always required the existence of trusts in the sense of a confidence, and at any rate they are of so ancient origin in this country that there is no record of the time of their introduction. Uses or trusts in the sense of beneficial interests, on the other hand, did not exist in this country until the reign of Edward I., when they were invented for the purpose of evading the Mortmain Acts (7 Edw. 1, c. 1; 13 Edw. 1, c. 32). These statutes, passed in order to prevent lands getting into the hands of religious houses whereby the rights of the lords were defeated, provided that lands should not be conveyed for religious purposes, and if they were so conveyed should be deemed forfeited to the lord. To evade these statutes the monks or clergy procured the lands, which they wished to hold, to be given to a third person *to the use* of the religious house. Here was the origin of uses, and under such a gift

the third person became the legal owner, and at law the religious house got nothing, but the clergy, who were the controllers of the Court of Chancery, compelled this legal owner to account to the religious house, the owner in *equity*, for the rents and profits.

A stringent Statute of Mortmain, passed in Richard's II.'s reign, stopped this particular evasion, by providing that lands so conveyed should be forfeited to the lord, just as if they had been conveyed directly to the religious house; but uses having been introduced took root in our system of jurisprudence, being found useful for many purposes, fraudulent and otherwise; for by their means lands could be secretly conveyed and devised by will, were not liable to be forfeited for treason, could not be taken under execution, &c. So by their means future estates could be created of a nature unknown to the common law. So useful were they found to be that lands were conveyed to uses "to the utter subversion of the ancient laws of this nation," and many statutes were passed with the view of reforming and governing them (see 1 Ric. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1); but notwithstanding this interference by the legislature uses continued to be adopted, and in Henry VIII.'s reign it was determined not to further reform them, but to extirpate and abolish them altogether, and with this object in view the Statute of Uses was passed. Before, however, considering the provisions of this famous Statute it may be well to consider some few points of interest connected with uses as they existed before the 27 Hen. 8, c. 10, was passed; and first as to—

(1) *How they might be created.* In one of three ways, viz. (i) *expressly*, as where lands were conveyed to A. to the use of B.; (ii) *impliedly*, as where B. purchases lands, pays the purchase-money and takes the conveyance in the name of A.; here there arose an implied use in favour of B. the purchaser, the courts of equity considering that he must have intended A. to hold as trustee for him; (iii) *by mere contract*, without conveyance. This arose in two cases, namely, first, when A. *covenanted that he would stand seised* of his lands to the use of some near relative, *e. g.* B., his wife; and, secondly, when A. bargained and sold his lands to B. who paid the purchase-money; here the covenantor, in the first case, and the bargainor, in the second case, was deemed a trustee for B. in whose favour a use was raised in, and enforced by, the courts of equity.

In each of the above cases, although A. was the legal owner, he was

bound to account in equity to B. for the rents and profits of the property. This brings us to the second point to be considered, namely—

(2) *How was the estate of the trustee (A. in the above cases) affected by the rules of law?* And generally it may be stated that it was subject to the same incidents it would have been had he held it for his own benefit. Thus a purchaser for value without notice of the trust, the heir of the trustee until Henry VI.'s reign, a creditor who had obtained execution, could all hold the lands free from the trust: so, too, the widow of the trustee got her dower. The third point for consideration is—

(3) *Who could be a trustee? and who was capable of being a cestui que trust?* As to this, all persons, excepting persons attainted and aliens, could be trustees; and all persons who could take a conveyance of lands directly might take such lands by way of use. You must, however, bear in mind that if lands were conveyed to the King or the Queen, or to any corporation (having a licence in mortmain), to the use of a third person, the trustee held the lands in these cases free from the trust and the cestui que use had no remedy.

(4) And lastly comes the question, *What property could be made the subject of a use?* In general, all corporeal hereditaments might be conveyed to uses, whether they were in possession or remainder; and many incorporeal hereditaments, such as advowsons, but naturally incorporeal hereditaments, the use of which was inseparable from the possession, as ways and commons, could not be conveyed to uses; but see now as to easements, 44 & 45 Vict. c. 41, post, p. 100.

These being some of the rules relating to the law of uses before the passing of the Statute of Uses, it now becomes necessary to consider what the provisions of this statute were, and in what way these rules were affected by it.

After a long preamble, in which the evils resulting from uses are detailed, the statute provided that when any person should be *seised* of "honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments," to the *use, trust or confidence* of any other person or body politic, such other person, &c. should from thenceforth be *seised* of such hereditaments for the like estate as they had in the use, trust or confidence; and that the estate of the person so *seised* to uses should be in him or them that have the use in such quality and condition as they had before in the use. In effect, this statute, as by "parliamentary magic," turned the use or former

equitable estate into the legal estate, and altogether annihilated the estate of the trustee, and thus extirpated, as was supposed, the difference between legal and equitable estate.

Taking the three examples given in the last page, in which A. is mentioned as the legal owner, and B. as having only an equitable interest, the effect of the statute in each of these cases is to transmit the possession to B. and make him the legal owner, and destroy altogether the estate of A. And so in every other case where lands under the statute are conveyed unto A. and his heirs, to the use of B. and his heirs, A. will get nothing, but B. will take both the legal and equitable estate; you must, however, remember that if the estate limited to the trustees is of copyhold tenure or only a chattel interest the statute will have no effect on it, for the statute uses the word *seised*, a word having no application to these classes of property, and therefore if leasehold lands are assigned to A. for 99 years to the use of B., here A. is still the legal owner, and B. has only an equitable interest, the Statute of Uses having no operation on such a limitation.

Such being the effect of the Statute of Uses, it becomes necessary to inquire how equitable estates, as distinguished from legal estates in lands, again arose.

The Common Law Courts having decided in Tyrrel's case, where lands were conveyed to A., to the use of B., to the use of C., that under such a conveyance B. was entitled to the property under the statute, and that C. got nothing, the Court of Chancery again stepped in, and said that it was evident that C. was the party intended to be benefited; and although B. was entitled to the property at law, he would be compelled in equity to hold the estate *in trust* for C.; and thus equity gave to the second or last use, or trust as it was called after the passing of the Statute of Uses, the same construction as before the statute it gave to the first or only use, and the principal effect of the Statute of Uses was to add the words *to the use* to every conveyance. Under the Statute of Uses the person having the first use has the legal estate, and the person having the last use or trust has the equitable estate, any intermediate uses going for nothing. Thus, lands conveyed unto D. to the use of A., to the use of B., in trust for C., gives A. the legal and C. the equitable estate, and B. gets nothing.

Equitable estates are now spoken of as *trusts*.

In dealing with equitable estates the Court of Chancery has, as far

as possible, followed the rules of law applicable to similar legal estates, thus the rule in Shelley's case generally applies to trust estates; there may be equitable, as well as legal, estates for life or years, in fee or in tail; again, equitable estates descend as legal estates, are subject to curtesy, and since the Dower Act (3 & 4 Will. 4, c. 105), applying to women married after the 1st January, 1834, to dower. So they are liable to be taken for payment of judgment debts.

Equitable estates, however, may be transferred with less formalities than are required with regard to legal estates, and on the death of the *cestui que trust* without heirs and intestate there is no escheat to the lord, but the trustee holds the property free from the trusts, but subject to the *cestui que trust's* debts.

With regard to the estate of the trustee, although liable at law to all the rules of law, equity now interferes in the *cestui que trust's* behalf to protect it from liability for the debts of the trustee, from the dower of his widow, and statute 13 & 14 Vict. c. 60 makes various provisions for the protection of the *cestui que trust* and his estate; but even now if the trustee conveys the legal estate to a *bonâ fide* purchaser for value without notice of the trust, equity, regarding, as it always does, such purchasers in a favourable light, will not deprive him of the legal estate he has obtained, but will allow him to keep it, although thereby the rights of the *cestui que trust* are defeated.

#### POINTS TO NOTE.

- I. In what respects prior to the passing of the Statute of Uses it was beneficial to have the legal estate in lands vested in a third person for the use of the owner instead of in the owner himself.
- II. What according to Lord Bacon the inconvenience of uses being resorted to were.
- III. What the requisites are to bring the Statute of Uses into operation.
- IV. Why it is that if A. bargains and sells his lands to B. to the use of C., B. gets under the statute the legal estate and C. only the equitable interest, while if A. granted the lands in the same way B. would get nothing, and C. would get both the legal and equitable estate.

V. What the doctrine of *Scintilla juris* was, and when abolished.

(N.B.—*Scintilla juris*. A spark (or glimmer) of law or right. If lands are conveyed by a father on the marriage of his son to trustees to the use of the father in fee until the marriage, and then to the use of the son for life, the question which formerly arose under such a settlement was, Who was seised to the use of the son on the marriage? the Statute of Uses having taken the whole of the seisin of the trustee and given it to the settlor. In answering the question it was held, that there remained in the trustees a *scintilla juris*, or possibility of being seised to the use of the son, and when the marriage took place the seisin shifted from the settlor to the trustees, the possibility being then converted into a fact; but now by 23 & 24 Vict. c. 38, every use takes effect as it arises by virtue of the original seisin of the trustee without the necessity of any *scintilla juris* remaining in him.)

VI. What estate B. would get under the following conveyance, viz. to A. for life, to the use of B. and his heirs.

VII. What construction the Courts of Common Law put on the Statute of Uses in Tyrrel's case.

VIII. What the nature of the estate of the trustee at law and of the *cestui que trust* in equity is.

IX. In what way trustees are protected by 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74.

X. How *active* and *passive* trusts, *executed* and *executory* trusts respectively differ.

XI. What the expression that "equity never wants a trustee" means.

XII. In what way or ways trusts of real and personal property may be respectively created and transferred.

XIII. Why it was formerly advisable to have a long term of years assigned "to attend the inheritance," and why it is no longer necessary that this should be done.

Chapter X.—Of Title in general.

REMARKS.

After noticing particularly the difference between titles by *purchase* and by *descent*, by *act of the law* and *act of the parties*, you must pass on to—

## Chapter XI.—On Descent.

## REMARKS.

This Chapter is a long and difficult one, and will require very careful reading.

To assist you in understanding the subject I propose to give the most important rules of descent under the Inheritance Act, with a simple illustration of each rule.

Rule I. Descent is to be traced from the last *purchaser*.

The word “purchaser” under the act means any one who last acquired the lands otherwise than by *descent*, *escheat*, *partition* or *enclosure*. Thus, supposing A. devises his lands by will to B., and then B. dies (after A.) intestate, without having disposed of the lands so given him, the lands will go to B.’s heir, a devisee under a will being a purchaser in exactly the same way as if B. had actually purchased the lands from A.; but had B. taken the lands as heir of A., on B.’s death intestate, as he was not a purchaser, descent would not be traced from him but from A. if he had acquired the lands by purchase, and if not, then the descent would be traced from the last person who could be proved to have so acquired the lands. Under the old law, if in the case given B. before his death had not become actually seised, either by entering on the lands, or by receiving the rents from a lessee of the freehold, descent would not have been traced from him, but from A., if A. had been so seised, the maxim being *Seisina facit stipitem*. This rule, which often caused great inconvenience, is now abolished, and, as you have seen, descent is always traced from the last *purchaser*, whether he actually entered or not.

Rule II. The lands shall lineally descend to the issue of the purchaser *in infinitum*.

This natural rule has always prevailed in England as in other countries, and by virtue of it as long as any lineal descendants (children, grandchildren, great grandchildren, &c.) of the purchaser are in existence, the lands shall go to them before lineal ancestors or collateral relations are admitted. Thus, in the case given, if B. left a son, a brother, and a father, the lands would go to the son; so if he had left a great grandson, a father, and a brother, the great grandson would take the property.



Rule III. Among children the lands descend to the sons before the daughters, and to the elder son before the younger; but if there are no sons or descendants of sons, then the daughters inherit altogether.

Thus, in the case given, if B. died leaving three sons and two daughters, the eldest son would take the whole of the lands to the exclusion of the other children; and if he were dead without leaving issue, the second son would take, and so the third son if his elder brothers were both dead without issue. This right of the eldest to succeed is known as the law of *primogeniture*, and harsh and inequitable as the rule often proves, it has been law in England generally (except in some few parts, *e.g.* in Kent, where gavelkind tenure prevails, and all the sons take equally), since at any rate the time of Henry III. The origin of primogeniture is traceable to the feudal system, under which it was found extremely inconvenient to divide the estate up among all the sons, for many and obvious reasons.

Supposing, however, the three sons were all dead without issue, then the lands would descend to B.'s two daughters equally as *coparceners*.

Rule IV. The issue of any child deceased represent their ancestor, subject among themselves to the provisions of the last rule.

Thus, if, in the case put, B.'s eldest son had died before B. leaving a son, here, as B.'s son would have taken the property had he lived, his son (B.'s grandson) stands in his place and takes the lands in preference to B.'s other children, and the result would be the same had B.'s son left a daughter instead of a son, for such daughter would stand in her father's place, and take before B.'s second son. As another example of this rule, supposing B. had three daughters and one died in his lifetime leaving three daughters (granddaughters to B.), here on B.'s death his lands will descend to his two daughters and three granddaughters as *coparceners*, the daughters each taking one-third and the granddaughters the other third, the share their mother (if living) would have had, between them; had the deceased daughter left a son and two daughters, then her son would take her share—as in admitting the issue of deceased children, the rule as to the preference of males, and the elder to the younger male, is observed.

Under this rule the issue are said to take *per stirpes* and not *per capita*.

These first four rules are of the greatest importance, as they apply equally to estates in fee tail as to estates in fee simple. The remaining rules which regulate the order in which the ancestors and collaterals inherit, only apply to estates in fee simple.

Rule V. If there are no lineal *descendants* of the purchaser, the lands go to the nearest lineal *ancestor* living in the preferable line.

Thus if, in the case put, B. died without any children, grandchildren, or other lineal descendants, but leaving a father, mother, brother and grandfather, his lands would go to his father under this rule, he being the nearest lineal ancestor, and of the preferable line.

This rule has made an important alteration of a most just nature in the old law, under which the father and other lineal ancestors were wholly excluded, although their issue were allowed to inherit, and, in the example put, B.'s brother would have inherited to the exclusion of his father and grandfather. The maxim under the old law was *Hæreditas nunquam ascendit*, a rule founded on feudal principles, it being thought that in many cases the ancestor would be decrepit, and therefore unfit, and often incapable, of rendering the feudal services.

Rule VI. In admitting the lineal ancestors, the paternal line is preferred to the maternal.

This rule speaks for itself, and an example is shown of it under the last rule, where the father is preferred to the mother of B. And not only is there this preference of the paternal over the maternal line, but in both lines the male branch is preferred to the female.

Rule VII. The issue of any deceased lineal ancestor shall stand in his or her place in the same way as, under Rule IV., the issue of children represent their parents, with this addition, that those related by the whole blood to the purchaser are preferred to those related by the half-blood.

Thus, in the case supposed, under Rule V., if B.'s father were dead, B.'s brother would take the property as representing the father to the exclusion of the grandfather and mother. The latter part of the rule, however, as to the admission of the half-blood, you will find more

difficult to understand. An example will explain who a kinsman of the half-blood is. Supposing B. has by his wife, C., two sons, D. and E., here D. and E. are kinsmen of the whole blood, being derived from the same couple of ancestors, B. and C. Supposing, again, B. has by his first wife, C., a son D., and by his second wife, H., a son E., here D. and E., although they have the same father, B., have not the same mother, and, consequently, not having the same couple of ancestors, they are not kinsmen of the whole, but of the half-blood. Now, on B.'s death, he being the purchaser, the lands would, under the present, as well as under the old law, descend, first, to his son D., he being the elder; and if he were then dead without issue, then to E., the question of half-blood not here arising; but supposing on B.'s death that the lands go, under B.'s will, to D., who afterwards dies intestate, and without issue, leaving his brother E. of the half-blood, and two sisters of the whole blood (*i. e.*, B.'s daughters by his first wife, C.), the lands will go to the sisters of the whole blood, or, if they are dead, to their issue (if any); and if they have died leaving no issue, then the lands will go, under this rule, to E., D.'s brother of the half-blood, the common ancestor, B., being a male, and the rule being that "Any one related to the person from whom descent is to be traced by the half-blood, shall be capable of being his heir; and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relative in the same degree of the whole blood and his issue where the common ancestor shall be a male, and *next after the common ancestor where such common ancestor shall be a female.*"

These italicised words require some explanation. In the case we have been considering, the common ancestor was a male, and, consequently, the half-blood inherited next after the kinsmen of the whole blood in the same degree, and their issue. Supposing, however, the common ancestor had been a female, that is, had the mother been twice married instead of the father, then the half-blood could not inherit until next after the common ancestor, *i. e.*, the mother. And before the maternal line is admitted the whole of the paternal line has to be exhausted, as was mentioned in connection with Rule VI.

A consideration of this rule, as to the admission of the half-blood, will show you that where the common ancestor is a male the half-blood have a very fair chance of inheriting; but that where the common ancestor is a female their chance is remote.

Before the Inheritance Act, the half-blood were wholly excluded, a rule which seems to have been based on no sound reasoning, and which often operated very harshly.

Rule VIII. Where there is a total failure of the heirs of the purchaser, the descent shall be traced from the person last entitled to the land, as if he had been the purchaser thereof.

This beneficial rule was added by 22 & 23 Vict. c. 35, ss. 19, 20, commonly known as Lord St. Leonards' Act, with the view of preventing escheats. Thus, before this rule, if the son of an illegitimate purchaser had inherited land on his father's death, and then died intestate and childless, the lands escheated; for the purchaser, having been a bastard, could have no heirs beside those of his own body. Now, however, in such a case, as there are no heirs of the last purchaser, under this rule the lands would not escheat, but descent would be traced from the purchaser's son, *the person last entitled*, just as if he had been the purchaser, and the lands would go to the son's mother and her heirs.

To sum up the above rules, in tracing descent under the present law: first, the lineal descendants of the last purchaser must be exhausted, then come the father and his issue, then the grandfather and his issue (on the father's side); the rules as to males being preferred to the females, and the elder male to the younger, and as to the half-blood, being observed. The male paternal ancestors and their issue failing, descent is traced among the female paternal ancestors, and here the great-grandmother (or even farther back) and her issue are preferred to the grandmother and her issue, and so on. The collaterals on the father's side being exhausted, those on the mother's side are searched for, the mother being taken first and then her issue, and so on.

In order to test your knowledge of the foregoing rules of descent thoroughly, you will find it advisable to go through the tables of descent, with the examples given by the learned author of the Commentaries. You will find a translation of the various Latin sentences and maxims appearing in this Chapter in Appendix A.

#### POINTS TO NOTE.

- I. Whether the law of descent is founded on statute or common law.
- II. What the meaning of "*Nemo est hæres viventis*," "heir apparent," "heir presumptive" is. (See Appendix A.)

- III. By what means collateral relations were allowed under the old law to inherit.
- IV. How a *feudum novum* differed from a *feudum antiquum*, and a *feudum novum* to be held *ut antiquum* from a *feudum strictè novum*.
- V. What the maxim "*Seisina facit stipitem*" meant, and why the old rule, which excluded lineal ancestors from inheriting, was inconvenient.
- VI. What the law of *primogeniture* is, and why it was introduced into this country, and in what cases the law holds good even among females.
- VII. What the reasons for excluding the ancestors and half-blood from inheriting under the old law were.
- VIII. The meaning of the maxims "*Hæreditas nunquam ascendit*," and "*Possessio fratris facit sororem esse hæredem*." (See Appendix A.)
- IX. What is meant by "breaking the descent."
- X. When an heir is said to be *seised in law* and when to be *seised in deed*.
- XI. What the meaning and derivation of the term *assets* are, and whether or not the heir or devisee of lands takes them subject to all or any, and if so what, debts of the deceased owner. (See 3 & 4 Will. & M. c. 14; 47 Geo. 3, c. 74; 3 & 4 Will. 4, c. 104; 32 & 33 Vict. c. 46, and 44 & 45 Vict. c. 41.)
- XII. A. seised of an estate in fee simple devises it to B., his eldest son,—whether B. takes as heir or as devisee, and therefore as purchaser.
- XIII. Whether under a limitation of lands to A. for life, remainder to the heirs of B., the heir of B. takes as purchaser or not, and what estate he will take, and whether there would be any difference if the limitation were to B. (instead of A.) for life, with remainder to the heirs of B.

#### Chapter XII.—Title by Escheat.

##### REMARKS.

Escheat may be defined "as the resulting back to the lord of the fee of the lands on the death of his tenant *in fee simple intestate and without heirs*." For the law of escheat is now confined to this case,

or, as it is called, escheat *propter defectum sanguinis*, for the other kind of escheat, *propter delictum tenentis*, which occurred when the owner of lands was attainted (*i.e.*, sentenced to death) for treason or felony, was abolished in 1870 by 33 & 34 Vict. c. 23. This act abolishes not only *escheat* but *forfeiture* as well, in convictions for felony and treason. It is important for you to remember that before this act, if the owner of lands became attainted for treason or felony, the lands were forfeited to the crown and escheated to the lord of the fee; but the escheat acted in subordination to the forfeiture, that is to say, the lands were first forfeited to the crown, in the case of felony for a year and a day, and in cases of treason altogether; so that in treason cases the lord's right of escheat, a right arising on account of the tenant breaking one of the conditions on which the feud was supposed to have been originally given to him, *viz.*, to hold it *dum bene se gesserit* (so long as he conducted himself properly), was entirely defeated by the crown's right of forfeiture; a prerogative of the crown derived from the Saxon law (the forfeiture being a part of the punishment for the offence), which was in no way diminished or superseded by the introduction of the Norman tenures. While, however, forfeiture only operated on estates vested in the offender at the time of attainder, the law of escheat went further, for by utterly corrupting the tenant's blood, it made him incapable of inheriting for the future; and as a consequence of this corruption of blood, the person attainted obstructed the descent of lands to his posterity wherever it was necessary to trace through him, the channel which conveyed the hereditary blood being by the attainder totally dammed up for the future. From this you will observe how peculiarly hard this doctrine of corruption of blood was, and, before the statute of 1870 entirely abolished it, several statutes modifying its effects had been previously passed, *viz.*, 54 Geo. 3, c. 145; 3 & 4 Will. 4, c. 106, s. 10, and 13 & 14 Vict. c. 60.

Escheat *propter defectum sanguinis* still occurs when a man dies *intestate* and without any heirs lineal or collateral. You will readily observe that this can rarely happen, as a man is almost sure to have some relation who can be his heir. The usual case in which it does occur is on the death of a bastard, for a bastard being *nullius filius* (nobody's son) can have no ancestors and no collateral relations. On the death of such a person, therefore, seised in fee simple of lands without *lineal* descendants (children, grandchildren), there must be an escheat, unless, indeed, he made a will disposing of the property.

A provision, however, has been recently made, as mentioned in the last Chapter, by statute to prevent in one case an escheat on the death of a bastard's son. (*Ante*, p. 55.)

Bastards not only cannot give a right of inheritance to any other than an heir of their own bodies but they cannot inherit.

Monsters, *i. e.*, those who bear any resemblance to the brute creation, cannot inherit. Hermaphrodites, *i. e.*, those who are partly male and partly female, having human shape, can inherit, and whether they take as males or females depends on which sex predominates. Aliens were formerly in a worse position than even bastards with regard to inheriting and giving a right of inheritance to lands, but now aliens of a friendly state may, by the Naturalization Act, 1870, take and dispose of property as British subjects.

Copyhold lands escheat to the lord of the manor, freeholds usually escheat to the crown, owing to the difficulty of discovering the intermediate lord.

#### POINTS TO NOTE.

- I. Whether a title by escheat is derived wholly or partially by act of law or by the lord's own act.
- II. Upon what principle the law of escheats is founded and into what two kinds escheats were formerly divided.
- III. Whether by our law or by the Roman law bastards or monsters have inheritable blood.
- IV. Whether, the rule in our law being that a bastard does not by the fact of the father subsequently marrying the mother become legitimate, there is any way by which on the father's death he may succeed to his father's land to the total bar of the legitimate children of his father and mother, and what the reason of the law on the point is.
- V. What the difference between a *bastard eigné* and a *mulier puisné* is. (N.B. This distinction is the point referred to in the last head.)
- VI. Why it is that bastards can have no *collateral* heirs.
- VII. To whom on the death of a bachelor bastard intestate his (1) copyholds, (2) freeholds, would respectively go.
- VIII. In what respects, prior to the Naturalization Act, 1870 (33 Vict. c. 14), aliens were on a worse footing than bastards with regard to holding lands—what the provisions of this statute were.

- IX. Upon what principle it was that aliens were by our law not allowed to have any inheritable blood in them.
- X. What the legal term "attainder" means.
- XI. How it sometimes happened that on attainder for treason there was a forfeiture, but no escheat.
- XII. Whether or not dower was affected by attainder.
- XIII. What the meaning of the following expression is, "Forfeiture affected only estates vested in the offender at the time of his attainder, but escheat pursued the matter."
- XIV. How the doctrine of corruption of blood has been affected by various statutes, and particularly by 54 Geo. 3, c. 145; 3 & 4 Will. 4, c. 106; 13 & 14 Vict. c. 60; and 33 & 34 Vict. c. 23.
- XV. Why it is that if a *cestui que trust* die intestate and without heirs, there is no escheat.

#### Chapter XIII.—Of Title by Occupancy.

##### REMARKS.

Occupancy consists of the right of taking possession of things which belong to nobody. As far as real property is concerned, the right only extended to the single instance where a tenant *pur autre vie* died during the lifetime of the *cestui que vie*, without having alienated his estate by act *inter vivos*. The first person who entered on the lands could keep them during the *cestui que vie*'s life as *general occupant*, unless the grant had been made to the tenant *pur autre vie* and his heirs, for then the heir succeeded as *special occupant*. *Special* occupancy still occurs, when an estate *pur autre vie* is granted to a man and his heirs, and the tenant dies without a will, but *general* occupancy was abolished by the Statute of Frauds, which enabled the tenant to dispose of the estate by his will, and provided that if he did not do so, the estate should go to the heir, if he was named in the grant, and otherwise should go to the executor or administrator as assets. Further enactments of a similar nature are contained in the Wills Act, 1837.

If a new island arises in the *middle* of a river it belongs in common to the owners of the lands on each side; but if it arises nearer one bank than another, then it belongs to the owner of the land on the side of the bank to which it is nearer. An island arising in the sea



belongs to the Crown. The Crown also is entitled to land from which the sea makes a sudden dereliction, although if it gradually recedes, the land becomes as gradually vested in the owner immediately behind, for *De minimis non curat lex* (The law does not care about small matters). So in the same way, if the sea makes a sudden irruption, the rights of the owner of the lands on which the irruption is made are not affected; if, however, the encroachment made by the sea is gradual, the rights of the owner of the land are as gradually transferred to the Crown.

#### Chapter XIV.—Title by Forfeiture.

##### REMARKS.

The law of mortmain is a subject you cannot be too well up in for examination purposes. Alienation in mortmain occurs whenever lands are conveyed to any corporation, whether ecclesiastical or temporal; but the term is usually applied to conveyances to *ecclesiastical* or *religious* houses, by means of which the lands become perpetually inherent in one *dead hand* (*in mortuâ manu*), whereby the king loses his escheat, and the lord his dues. To prevent lands being so conveyed, corporations have not been allowed, from very early times, to purchase lands without a licence from the Crown, but as the Church evaded the law, and procured grants of lands to them without the required licence, it became necessary for the legislature to interfere from time to time to prevent the clergy evading the existing law. The first provision relating to mortmain was contained in Henry III.'s Magna Charta (9 Hen. 3, c. 36).

This old statute forbade religious corporations aggregate to take gifts in mortmain. The enactment did not apply to corporations sole (*e.g.* bishops); and corporations aggregate evaded it by means of long terms of years being created, an evasion stopped by the statute *De Religiosis* (7 Edw. 1), which expressly provided, that all lands, by whatever pretence brought into mortmain, should be forfeited,—a provision, however, soon evaded by the crafty clergy and their counsel, of whom, says Sir Edward Coke, “they always had the best,” by means of fictitious and collusive actions known as *common recoveries*,—an evasion stopped by 13 Edw. 1, c. 32, which directed such recoveries to be tried before a jury, and if they found that the claimants had no real title to the lands, they should be forfeited under the *De Religiosis*. Hereupon uses were invented, by means of which lands were conveyed to a third person, who became the legal owner, *to the use* of the Church, who became the equitable owner, *i.e.* entitled in

Chancery to compel the legal owner to account for the profits; but a stringent act of mortmain passed in Richard's II.'s reign put an end to this by making uses subject to the *De Religiosis* statute. No further act was made with regard to conveyances in *mortmain* until Henry's VIII.'s reign, when it was found that lands were, without being conveyed to corporate bodies, frequently given for *superstitious uses*, *i. e.* they were made liable in the hands of heirs and devisees to the charge of chaunteries, and the like; and as such gifts were of a pernicious effect, 23 Hen. 8, c. 10, provided that in future they should be altogether void, if given for longer than 20 years for these purposes. Next in order of date comes a statute of Philip & Mary (1 & 2 P. & M. c. 8), which suspended the operation of the acts mentioned for 20 years; and then in George II.'s reign came the statute—usually referred to as the *recent* statute of mortmain, to distinguish it from the statutes already referred to (or the *original* statutes of mortmain, as they are sometimes called)—9 Geo. 2, c. 36, the object of which was to prevent lands, or anything savouring of lands, being given to *charitable uses* by will or by any other means than that provided in the statute.

It is most essential that you should remember the formalities required to be observed under this statute when conveying lands to charities. These formalities are—(1) the conveyance must be by deed, (2) the deed must be executed twelve months before the donor's death, (3) two witnesses must attest the deed, (4) the deed must be enrolled within six months of execution in the Chancery Division of the High Court.

If stock in the funds is to be sold, and the purchase-money laid out in lands for charitable uses, the transfer of the stock must be effected six months before the donor's death.

With regard to requisite No. 2, this has no application if value is paid for the grant, and this value may now consist of a rent-charge. (24 Vict. c. 9; 27 Vict. c. 13.)

The statute does not apply to gifts to the two Universities of Oxford and Cambridge, or to any of their colleges, or to the colleges of Eton, Winchester, and Westminster. Various exceptions have also been subsequently made by statute, and, among others, gifts to the British Museum, and to the Greenwich and the Foundling Hospitals, are allowed, notwithstanding 9 Geo. 2, c. 36.

So, by the Public Parks Act, 1871, lands may be given for the purposes of a public park, a museum, or a school-house, by deed or

will, but even here certain formalities must be observed, viz. if voluntary (*i. e.* if no value is paid for the grant), the instrument, whether a deed or a will, must be executed twelve months before the donor die, and be enrolled within six months of *its coming into operation* with the Charity Commissioners, and the gift, if *by will*, must be limited to twenty acres for a park, two for a museum, and one acre for a school-house.

#### POINTS TO NOTE.

- I. What the term forfeiture means, and what the usual cases are in which it occurs.
- II. How the law of mortmain was relaxed by 1 & 2 Ph. & M. c. 8, and 7 & 8 Will. 3, c. 37.
- III. In what way a tenant of a particular estate might forfeit it to the person entitled in remainder or reversion.
- IV. Whether or not there was any difference with regard to this forfeiture by alienation when the person aliening was tenant for life or years and when he was tenant in tail.
- V. In what way this forfeiture by alienation with regard to the reversioner's rights differed from the forfeiture of an estate by breach of a condition annexed to it.
- VI. What provision with regard to forfeiture by alienation is made by 8 & 9 Vict. c. 106, s. 4.
- VII. How forfeiture of estates by *disclaimer* occurs. The difference between actual and virtual disclaimer.

#### Chapter XV.—On Title by Alienation.

##### REMARKS.

Under the feudal system in its pure state the tenant could not convey his estate without a double consent, viz., of his lord and of his heir, apparent or presumptive. So, too, the feudal obligation being reciprocal, the lord could not convey his seigniority to another without his tenant's consent. This consent of the tenant to a new lord was called *Attornment*. It was soon found that in the civil interests of the country it was desirable that lands should be capable of free alienation, and in Henry I.'s reign the tenant was enabled to dispose of lands which *he had himself purchased*, but he was not allowed to totally disinherit his heirs unless he had purchased to him and his

assigns. Next, he was allowed to dispose of one-fourth, then one-half, of the lands which he had inherited (Hen. III.). Then, in Edward I.'s reign, the *Quia Emptores* Statute (18 Edw. I.) allowed all persons (except tenants *in capite*—the Crown tenants, who could not aliene until 1 Edw. 3, c. 15, allowed them to do so on paying a fine) "to aliene freely, provided conveyances of the fee were made to hold of the chief lord and not of the grantor," thus abolishing the practice of subinfeudation which had before prevailed.

Fines on alienation were payable, in certain cases, until 12 Car. 2, c. 24, abolished the military tenures, and with it these fines and other burdensome services.

The necessity for the tenant's attornment when the lord conveyed away his interest continued until it was abolished by 4 & 5 Anne, c. 16.

#### POINTS TO NOTE.

- I. What the effect of a condition in a conveyance in fee simple restraining the alienation (whole or partial) of land is, and whether there would be any difference in this respect if the conveyance were in fee tail or for a term of years.
- II. Whether or not mere rights of entry and contingent interests could always or can at the present time be devised or conveyed.
- III. What exceptions there are to the general rule that all persons are capable of conveying and purchasing lands.
- IV. In what position (1) persons attainted, (2) corporations, are with regard to purchasing and conveying land.
- V. What the provisions of 5 & 6 Will. 4, c. 76 (s. 94), and 6 & 7 Will. 4, c. 104 (s. 2), relating to conveyances by corporations *municipal*, are.
- VI. What the effect of conveyances by persons *non compos mentis* is, and whether there is any difference if the conveyance is made by way of *feoffment*.
- VII. What the difference between a *void* and *voidable* conveyance is.
- VIII. Whether or not a person *non compos mentis* is bound by a *purchase* of lands made by him.
- IX. What the effect of conveyances to, and purchases by, infants and persons under duress is.

- X. A married woman *purchases* lands without her husband's consent : what the effect of the conveyance (1) during the husband's lifetime, (2) after his death in his wife's lifetime, is.
- XI. In what way a married woman formerly did, and in what way she may now (1) convey, (2) disclaim her interests in lands.
- XII. What the position of aliens is at the present time with regard to purchasing and conveying lands.
- XIII. In what way *settled* estates may be alienated under the provisions of the Settled Estates Act, 1877.

#### Chapter XVI.—Of Deeds.

##### REMARKS.

Deeds are divided into *deed polls* and *indentures*. The former are made by one party only, and are now, and always have been, shaved even at the top. The latter are used when there are several parties, and the term *indenture* is derived from the old custom of engrossing the deed on one piece of parchment as many times as there were parties, writing a word between each part, and then cutting them in a jagged manner, so that each separated part had a portion of the word on it, and the authenticity of the deed was readily proved by merely fitting the parts together. This practice of indenting deeds long ago fell into disuse, and the more modern practice of simply cutting the deed with a waving line at the top was rendered unnecessary in 1845 (8 & 9 Vict. c. 106), and now indentures as well as deed polls are shaved even at the top.

A deed may be defined as "an instrument written or printed on paper or parchment, *sealed and delivered*."

The principal parts of a deed are—

(a) *Date*. This generally appears, but is not absolutely essential, for if no date is inserted the deed operates from its delivery; so the deed is not void, although its date be impossible, *e. g.* if it is 30th February.

(b) *The parties*, who must be able and willing to contract. It was formerly absolutely necessary to make every one a party who was to take any interest under the deed; but now, by 8 & 9 Vict. c. 106, an immediate interest in hereditaments, and the benefit of any condition or covenant respecting hereditaments, may be taken by a person who is not a party to the deed.

(c) *The recitals.* These show the nature of the transaction intended to be carried out by the deed; and having regard to the doctrine of *estoppel*, which prevents a man averring or proving anything in contradiction to what appears in a deed which he has solemnly and deliberately delivered as his deed, recitals should be drawn with great care.

(d) *Operative or witnessing part.* This shows the thing effected by the deed, the consideration for it, and the rights of the parties under it.

(e) *The parcels*, containing a description of the property conveyed.

(N.B.—The five preceding heads are considered in the Commentaries as constituting the *premises* of the deed.)

(f) *The habendum and tenendum* (to have and to hold); the former defining the estate to be taken by the grantee; the latter (now practically useless) was formerly used to denote the tenure by which the lands granted were to be held.

(g) *Reddendum or reservation*—something rendered by the grantee of the property (to the grantor, and not to a stranger) as a sort of consideration for the grant, such as rent.

(h) *Conditions* on which the grant is made. These are inserted to alter the operation of the deed on the happening of certain events. The proviso for redemption contained in mortgage deeds is a familiar instance of such a condition.

(i) *Warranty clauses.* These are now obsolete in conveyances of real property; the grantee's security being secured by means of—

(j) *Covenants*, which are clauses of agreement, whereby either party may stipulate for the truth of certain facts, or bind himself to perform or give something to the other. Covenants are either *real* or *personal*; the former, which are said to run with the land, are those the obligation and the benefit of which affect the successive owners of the property; the latter, when the benefit and liability attach to a particular person and his representatives only.

(k) *The execution.* This is effected by the parties *signing, sealing, and delivering* the instrument. The delivery may be absolute or it may be conditional; in the latter case it is only an *Escrow* until the condition is performed. *Sealing and delivering* are absolutely necessary to the validity of a deed, and in some cases *signing* also; but in many cases signature is not absolutely necessary, though always and advisedly added in practice.

(1) *Attestation.* This formality, although not strictly necessary except when required by (a) direction of some person, as in deeds executed under power, or (b) by act of parliament, as in conveyances to charities, wills, cognovits, &c., should never be dispensed with, as it is of great importance for the purpose of preserving the authenticity of the instrument.

POINTS TO NOTE.

- I. What conveyances are by 8 & 9 Vict. c. 106, required to be by deed.
- II. What the doctrine of "estoppel" is, and what the various kinds of estoppel are.
- III. When "merger" of contracts occurs.
- IV. What the terms *syngrapha*, *chirographa*, and *counterpart* respectively mean.
- V. What the object of *indenting* deeds was.
- VI. How *deed polls* differ from *indentures* at the present time.
- VII. What the requisites to a valid deed are.
- VIII. What is meant by the "premises" of a deed.
- IX. What the object of inserting a warranty in a deed was, and what the difference between a "lineal" and a "collateral" warranty was.
- X. What the meaning of the legal term "covenant" is, and what covenants were formerly implied from the use of the word "grant" in a deed, and under what circumstances this word still implies covenants.
- XI. When (a) the reading of, (b) signature to a deed is absolutely necessary to its validity.
- XII. What advantage is derived from having a deed properly attested.
- XIII. How a deed may be invalidated.
- XIV. What is meant by a "voluntary" deed, and under what circumstances such deeds are liable to be set aside. (See 13 Eliz. c. 5, 27 Eliz. c. 4, and sect. 91 of the Bankruptcy Act, 1869.)

- XV. How "valuable" and "good" considerations differ.
- XVI. What the reason of the rule is that simple contracts are absolutely void unless made for some valuable consideration, while deeds are as between the parties binding, although made without consideration.
- XVII. By what leading rules Courts are guided in construing deeds.  
(N.B.—For a translation of the Latin rules for the construction of deeds, see Appendix A.)
- XVIII. How the rules for the construction of wills and deeds differ.
- XIX. What clauses are implied in conveyances by the Conveyancing Act, 1881.  
[N.B.—This statute incorporates the general words and covenants usually inserted, see *post*, p. 100.]

#### TEST PAPER TO WORK OUT.

1. Contrast estates held in joint tenancy, tenancy in common, and coparcenary, and show why it is that the *jus accrescendi* only applies to joint-tenants.
2. Explain the law of "hotchpot" in connection with estates given in frank-marriage.
3. In what three ways, prior to the Statute of Uses, were uses created?
4. How does a title by purchase differ from a title by descent?
5. A. dies, leaving two grand-daughters, the issue of a deceased daughter, and two daughters, to whom will his estate in fee simple descend? Would your answer be the same if the grand-daughters had been the issue of a deceased son?
6. What do you understand by (a) a title by escheat, (b) a title by occupancy? Show how they may respectively arise.
7. Distinguish between a void and voidable conveyance. A., being insane, in one case enfeoffs B. in fee, and in another case conveys lands to B. in fee by deed of grant. Is there any difference in the effect of the two conveyances?
8. What are the requisites to a valid deed? how may a deed be avoided? and by what rules are deeds construed?



### Fourth Week's Work.

- CHAPTER XVII.—*Of Ordinary Conveyances at Common Law.*  
 „ XVIII.—*Of Conveyances under the Statute of Uses.*  
 „ XIX.—*Of Conveyances by Tenants in Tail and Married Women.*  
 „ XX.—*Of Devises.*  
 „ XXI.—*Of Extraordinary Conveyances.*  
 „ XXII.—*Of Copyholds.*  
 „ XXIII.—*Of Incorporeal Hereditaments.*  
 „ XXIV.—*Of Certain recent Statutory Protections afforded to Purchasers and Mortgagees against Insecure Titles.*

Chapter XVII.—*Of Ordinary Conveyances.* And, First, of those at Common Law.

#### REMARKS.

Previous to Henry VIII.'s reign, conveyances of lands of freehold tenure were of two kinds, viz.—(1) *In pais* (in the country), *i. e.* on the very spot to be transferred; and (2) *By matter of Record*, *i. e.* effected by an assurance in the Superior Court. In Henry VIII.'s reign a new class of conveyances was introduced by the Statute of Uses, and thus conveyances *in pais* or *ordinary* conveyances (as distinguished from conveyances *by matter of record* or *extraordinary* conveyances which have not been affected by statute) are divided into—(a) Conveyances at common law; and (b) Conveyances operating by statute. This Chapter is devoted to conveyances at common law, of which the following ten sorts are given in the Commentaries:—

#### 1. *A Feoffment.*

This was the ancient mode of conveying *freehold* interests in *possession* in *corporeal* hereditaments. It is very necessary that you should observe the words italicised, for it was for these purposes only that a feoffment was used. To complete a feoffment proper words of *donation* and *limitation* had to be used, and livery of seisin must have been made. This livery was of two kinds, viz. *livery in deed* (*i. e.* actual delivery on the spot), and *livery in law*, when the parties did not go on to the land, but merely in sight of it, and the feoffee had

to complete his title by entry *during the feoffor's life*, otherwise the livery was void. Feoffments were first required to be evidenced by writing by the Statute of Frauds; and now, by 8 & 9 Vict. c. 106, they must, when used, be by deed, unless made by an infant under the custom of gavelkind—the only case, indeed, in which at the present day feoffments are used—though you will bear in mind that they may still be used in any case to convey immediate freehold interests in corporeal property, for 8 & 9 Vict. c. 106, does not say that corporeal hereditaments shall *only lie in grant*, but that they shall “lie in grant as well as in livery,” that is, shall be capable of being conveyed by deed of grant as well as by livery of seisin. If a feoffment is now used, and no livery of seisin is made, it will not be, as formerly, void, but the charter of feoffment will take effect as a deed of grant and pass the lands.

## 2. *A Grant.*

This form of conveyance is now the one principally used in practice, but at common law, and before 8 & 9 Vict. c. 106 made corporeal hereditaments capable of being conveyed by grant, a deed of grant was used for two purposes, viz. (1) for transferring estates in expectancy (remainders and reversions), and (2) for transferring incorporeal hereditaments, such as advowsons, rights of way, rents, &c., which were, from their very nature, incapable of livery. The word “grant” need not be used (see 44 & 45 Vict. c. 41, *post*, p. 100).

## 3. *A Lease.*

A conveyance (sometimes also called a *demise*) by which the grantor or lessor divests himself of a portion of his interest in lands in favour of another.

The requisites to a valid lease are—

- (1.) It must be in writing, and signed under the Statute of Frauds, and by 8 & 9 Vict. c. 106, it must be by deed, *unless* (and the exception is an important one) the lease is for less than three years, and two-thirds of a rack-rent are reserved, for in this case the lease is good, though by word of mouth only.
- (2.) It must be a less estate than the lessor has in the property. Thus, a tenant for a term of years, however long, cannot grant a lease for life.

(3.) The lease must be for a *certain* period. Thus, a lease for as many years as J. S. shall live is void, for here there is no certainty, although a lease for as many years as J. S. shall name is good, for the term may be made certain at any time by J. S. fixing the period, and the legal maxim is, *Id certum est quod certum reddi potest*.

(4.) The lessee must, to complete his title, enter on the lands, for, until entry, he has a mere *interesse termini*.

In addition to these requisites, nearly every lease contains covenants by the lessee to pay rent and perform certain covenants, and these covenants, *if they concern the premises* demised, will bind not only the lessee, who is liable in respect of them during the whole term, whether he assigns or not, but also any assignee of the term, the assignee's liability differing from the lessee's in that it ceases on his again assigning.

Referring to requisite No. 1, when an instrument in writing is void as a lease because not sealed, it operates in equity as a valid agreement for a lease, and as such will be enforced. You must remember that, although certain parol leases are good, *all agreements* for leases are void unless in writing and signed under sect. 4 of the Statute of Frauds.

#### 4. *An Exchange.*

A mutual grant of *equal* interests, *e. g.* a fee simple for a fee simple, a term of years for another term of years, the one in consideration of the other. Its requisites are—

- (1.) It must be in writing under the Statute of Frauds, and by deed under 8 & 9 Vict. c. 106.
- (2.) Entry must be made on both sides, the exchange being void if either party die before entry.

Exchanges formerly implied a warranty of each party's title, whereby if either party was evicted from the lands taken in exchange, he returned back into the possession of his former land. The inconvenience of this prevented exchanges being much used, mutual conveyances by the parties being preferred. By 8 & 9 Vict. c. 106, this implied warranty was abolished.

#### 5. *Partition.*

This arises when two or more co-owners of property (coparceners, joint tenants or tenants in common) agree to divide the lands, so that

each may hold in severalty a distinct share. Partitions by joint tenants and tenants in common were always required to be by deed, but partitions by coparceners were good although by word of mouth only, until the Statute of Frauds required all partitions to be in writing and signed; and now by 8 & 9 Vict. c. 106, partitions are in every case (except of copyholds) required to be by deed.

The five conveyances mentioned are called *primary* or *original* conveyances—while the five conveyances which follow are said to be of a *secondary* nature, because they imply the existence of some precedent conveyance.

#### 6. Release.

This is a conveyance whereby rights are extinguished, or estates are conveyed to a person already having an interest or possession in the same property. These releases are of five kinds, viz.: (1) By way of *enlarger l'estate*. (2) By way of *mitter l'estate*. (3) By way of *mitter le droit*. (4) By way of extinguishment. (5) By way of *entry and feoffment*.

(N.B.—You must look up carefully the difference between these various releases.)

A deed has always been necessary in the case of express releases, but where a release was implied by law from certain circumstances a deed was never, and is not still, necessary.

#### 7. Confirmation.

A conveyance whereby an estate or right *in esse* of a voidable or conditional nature is made sure, or whereby a particular estate is increased. Its requisites are: (1) A precedent estate to ground the confirmation upon. (2) The confirming party must be aware of his rights. (3) A deed must be used unless the confirmation be implied by law.

#### 8. Surrenders.

This conveyance is the exact opposite to a release, it being the conveyance of the particular estate to the person entitled in remainder or reversion, whereby the particular estate is merged or drowned. Its requisites are: (1) The estate surrendered must be the smaller estate; thus, a fee simple cannot be surrendered. (2) It must be the next estate to that in which it is to be merged. (3) There must be privity between the parties; thus, if A. leases to B. for 100 years, and B.

underleases the property to C. for 99 years, C. cannot surrender to A., only to B., and B. to A. (4) It must be in writing under the Statute of Frauds, and by deed under 8 & 9 Vict. c. 106, unless the surrender be of a copyhold estate, or it take place by operation of law.

#### 9. *Assignment.*

This is a transfer of a person's whole interest in land, and is particularly applied to the transfer of an estate for life or years.

Assignments were required by the Statute of Frauds to be in writing, and now by 8 & 9 Vict. c. 106 must be by deed, whether the estate assigned is a freehold or a mere chattel interest. The Acts do not however apply to copyhold estates.

#### 10. *Defeasance.*

This is a collateral deed, by which an interest created by another deed may on certain named conditions being performed be defeated, or wholly undone. Things *executed*, and estates of freehold, can only be defeated by a deed executed at the same time as the principal deed; but things *executory* (*i. e.* a covenant to do something in future) and chattel interests may be defeated by a deed subsequently executed, if all the parties to the original deed join in the defeasance.

#### POINTS TO NOTE.

- I. On what principle it was that if no words of limitation were used on a feoffment being made the feoffee only acquired an estate for life.
- II. What *livery of seisin* was.
- III. What the doctrine of *continual claim* in connection with feoffments was, and how affected by 3 & 4 Will. 4, c. 27, s. 11.
- IV. Feoffments formerly had a "tortious operation;" what this meant, and how the doctrine has been affected by 8 & 9 Vict. c. 106, s. 4.
- V. "Corporeal hereditaments formerly lay in livery, while incorporeal hereditaments lay in grant;" what this meant, and how affected by 8 & 9 Vict. c. 106, s. 2.
- VI. When the necessity for the tenant of a particular estate to attorn to the grantee of the reversion was abolished.
- VII. Whether there is any, and if so, what, difference between agreements to let and leases to take effect *in futuro*.

- VIII. What the word "farm" originally meant.
- IX. What the proper operative words to use in (1) leases, (2) confirmations, (3) surrenders, (4) releases, (5) assignments, (6) grants respectively are.
- X. Whether or not a life estate can be *exchanged* for an estate tail.
- XI. Why it was that in exchanges and releases livery of seisin was unnecessary.
- XII. With regard to releases by way of *enlarger l'estate*, it is necessary that the estate of the releasee should be *complete and vested*, and that *privity of estate* should exist between relessor and relesee—explain what is meant by these expressions.
- XIII. What releases by way of (1) passing estates, (2) passing rights, (3) extinguishing rights, (4) entry and feoffment respectively are, and how they occur.
- XIV. A. grants a lease to B. for 99 years, B. underlets to C. for 21 years at a certain rent, B. then surrenders his lease to A. for the purpose of having a new lease granted to him; what the former effect on the lease to C. this surrender had, and what provisions with regard to the surrender of leases was made by 4 Geo. 2, c. 28, and 8 & 9 Vict. c. 106, s. 9.
- XV. An assignee of leaseholds is liable for those covenants in the lease which *run with the land*; what an explanation of the words italicised is, and why it is that an underlessee does not incur the same liability.
- XVI. Mortgages were in former times generally made by feoffment in fee, subject to a deed of defeasance; what the nature of the defeasance deed in this case was, and why it must have been executed at the same time as the feoffment.
- XVII. Why, according to Lord Talbot, the practice of drawing an absolute deed and making a deed of defeasance should be discouraged.

**Chapter XVIII.—Of Conveyances under the Statute of Uses.**

**REMARKS.**

The present Chapter will show you that, although, as you will remember from the Chapters on Uses and Trusts, the main object of the Statute of Uses was defeated by a second use or trust being added

when it was desired to create an equitable estate in land, this famous statute had a most important effect on the law of conveyancing; so much so, that it is called by some writers "The Keystone," and by others the "Magna Charta," of conveyancing.

Before the statute was passed there were two ways in which uses or equitable estates could be created, namely, by a feoffment to one person to the use of another, or upon contract, express or implied—express in the case of a *covenant to stand seised*, and implied in the case of a *bargain and sale*. The two last operated secretly in equity only, and the original owner remained seised, but as he held subject to the use his ownership was nominal only. After the statute, these conveyances passed the legal estates—uses being turned into legal estates by its provisions—without the formalities and solemnities required by law, and they are therefore said to operate under the Statute of Uses. In addition to these three, viz., *feoffments to uses*, *bargains and sale*, *covenants to stand seised*, conveyances by way of *lease and release*, and by way of *grant to uses*, are said to operate under the statute. A few words in connection with each.

#### 1. *Feoffment to Uses.*

If A. wishes to convey by means of this conveyance to B. in fee, he does so by enfeoffing C. in fee to the use of B. in fee; and as before the statute B. would have had the equitable estate by virtue of it, the legal estate at once passes to him. But as it is necessary to make formal livery of seisin to the feoffee (C.), this form of conveyance has been little used.

#### 2. *Covenant to stand Seised.*

Before the Statute of Uses, if a man seised of lands covenanted that he would stand seised of them to the use of his child, wife, or kinsman, although no estate passed at law, equity considered the covenantor as a trustee for the covenantee, who acquired the use in the lands. After the statute the legal estate and corporeal possession became at once vested in the covenantee. This mode of conveyance is only allowed on the weighty consideration of blood or marriage, and is now almost obsolete.

#### 3. *Bargain and Sale.*

This was a mode frequently adopted before the Statute of Uses for conveying lands, or rather the use in lands, without the necessity of

the notorious livery of seisin. Thus, if A. wished to sell his lands to B. he could do so secretly by a bargain and sale and receipt of B.'s money, whereby, although no legal estate passed to B., equity compelled him (A.), as he had received the purchase-money, to hold as trustee for B. After the Statute of Uses, in such a case B. became by a mere money payment the legal owner, without any publicity, and even without any deed or writing. To prevent lands being thus legally conveyed, in secret as it were, the Statute of Enrolments (27 Hen. 8, c. 16) was at once passed, requiring all bargains and sales of freehold estates to be by deed and publicly enrolled. The act only speaking of freehold estates, a means of evading its provisions was soon discovered by Sir Francis Moore, who invented another mode, and one which until the year 1841 was in common use—of conveying lands. This conveyance was by

#### 4. *Lease and Release.*

And consisted of two parts—(1) a bargain and sale; and (2) a common law release. Thus, if A. wished to convey his lands to B. secretly, *i. e.* without livery of seisin and without a publicly-enrolled bargain and sale, he first of all bargained and sold (or leased) for a pecuniary consideration the lands to B. for a year. This gave B. the corporeal possession of the lands for a year without entry and without enrolment, the Statute of Enrolments only applying to freehold estates, and not to mere chattel interests, which in those days were not thought worth consideration, and being in possession he could accept a release of A.'s reversion, which was granted to him the next day. This lease or, as it would be more properly called, bargain and sale for a year was a mere form; but it continued to be used, and necessarily so, as on it the whole title was founded, until 1841, when the necessity for it was abolished, 4 & 5 Vict. c. 21 enacting that a release, if made in pursuance of the statute, should answer the purpose of a lease and release. This release (Statutory Release, as it is properly termed) continued the common conveyance of lands from 1841 to 1845, when the necessity for resorting to practices for evading the livery of seisin required for conveying corporeal hereditaments was done away with, 8 & 9 Vict. c. 106 providing that corporeal hereditaments should lie in grant (*i. e.* be conveyed by deed of grant) as well as in livery (*i. e.* by livery of seisin), and since this statute



lands have been commonly conveyed by the fifth and last mode of conveyance to be mentioned, viz. :

5. *Grant, or Grant to Uses.*

POINTS TO NOTE.

- I. With regard to conveyances to uses, what the requisites are to bring the Statute of Uses into operation.
- II. Why it is that an existing term of years cannot be transferred by a deed operating by means of uses.
- III. What effect on a feoffment the Statute of Uses had.
- IV. Under what circumstances a use is implied by law, and by what name such a use is known.
- V. "Limitations by way of use are, as a general rule, subject to common law principles." What is meant by this.
- VI. Whether by a common law conveyance, or by a conveyance operating under the Statute of Uses, a man can (1) become a purchaser by his own conveyance; (2) convey to his wife; (3) limit an estate *in futuro*. How far the question is affected by 44 & 45 Vict. c. 41. See *post*, p. 100.
- VII. What a *springing* use is, and why sometimes called an *executory* use, and for what purposes used.
- VIII. What the common law maxim, "A fee cannot be limited on a fee," meant.
- IX. A. wishes to limit property to B. in fee, but so that on C.'s returning from Rome the property is to belong to C. Whether there was at common law, or is at the present time, any means by which A.'s object can be carried out.
- X. What a *shifting* or *secondary* use is, and for what purposes resorted to.
- XI. What the difference between a conditional limitation at common law and one under the Statute of Uses is.
- XII. Why it is that estates capable of being considered as *remainders* are never to be construed as *shifting* or *springing* uses.
- XIII. At common law a grantor could not reserve to himself the power of revoking the grant. Whether or not he can do this by means of a conveyance operating under the Statute of Uses.

- XIV. What is meant by a "power." How mere powers of revocation differ from powers of revocation and new appointment.
- XV. For what purpose powers are often resorted to.
- XVI. An appointment under a power is not an independent conveyance. What this means.
- XVII. Conveyances operating under the Statute of Uses were called *innocent* conveyances. What the reason of this term being applied to them was.
- XVIII. What, with regard to the alienation of estates—(1) the advantages, (2) the disadvantages, derived from the Statute of Uses were.
- XIX. What the term *perpetuity* means.
- XX. What the rule against perpetuities is,—in other words, within what time executory interests must arise.
- XXI. Having regard to this rule against perpetuities, and to the Thellusson Act, for what period the accumulation of income of real or personal property may be directed.
- XXII. To what directions to accumulate the Thellusson Act does not apply.

#### Chapter XIX.—Of Fines and Recoveries.

##### REMARKS.

This Chapter treats at some considerable length of the modes by which tenants in tail and married women, who are incapable of conveying by any of the modes of conveyances already mentioned in their simple form—tenants in tail because of the wording of the De Donis Statute, and married women because, being under the control of their husbands, they are not free agents—have from time to time transferred their interests in real property to third persons. Before the passing of 3 & 4 Will. 4, c. 74, in 1833, these interests were conveyed by means of fictitious and collusive proceedings, known as *Fines* and *Recoveries*. These may be considered as instances of conveyances by *matter of record*, because they rested not entirely on the act or consent of the grantor and grantee only, but on the sanction of a Court of Record, which was called in to preserve and be a perpetual testimony of the transfer of the property. Although these Fines and Recoveries are now, and have been since 1833, entirely abolished, it

is necessary that you should understand the purposes for which they were used and the mode in which they operated. And I will now proceed to give you some short account of their nature, the more easily to enable you to acquire the necessary knowledge.

1. Fines, which seem to have existed from very early times, were fictitious actions commenced by the purchaser of lands against the vendor for the breach of an alleged contract to convey the land. The defendant acknowledged that the action was just (hence he was called the *cognisor* and the plaintiff the *cognizee*), and the matter was compromised by leave of the Court, and the land in question acknowledged to be the right of the plaintiff. The proceeding was called a *Fine*, because, it put an end to, not only the action thus commenced, but to all controversies respecting the same matter. In the reigns of Henry VII. and Elizabeth provision was made for the reading and proclamation of fines in open Court sixteen times, and for a list of all fines levied, being duly published. If so proclaimed and levied, the rights not only of those who were *party* and *privy* to the fine, but of all strangers were barred, unless they made claim within *five* years after the proclamation, or if under disability, *e. g.*, if they were infants, married women, persons non compos mentis, or beyond the seas, within five years from the disability ceasing.

In Fines the five principal steps taken were:—

- (1.) The issuing the writ of covenant and payment of the *primer fine*.
- (2.) The *licentia concordi*, a step taken by the defendant to obtain the leave of the Court to agree (or compromise) the action. The leave was granted on payment of a fine known as the *king's silver*, or sometimes as the *post fine*.
- (3.) The giving of the *concord*, whereby generally the defendant acknowledged that the lands were the right of the plaintiff.
- (4.) The drawing up of the *note* of the fine, showing the parties, the parcels, and the agreement, which was duly enrolled.
- (5.) Lastly came the *foot* or *conclusion* of the fine, showing the parties, day, year, and place, and before whom it was acknowledged or levied.

Fines were of four kinds, viz.:

- (1.) A fine *sur cognizance de droit come ceo que il ad de son don*. This was the most usual as well as the surest kind of fine, as by it the defendant acknowledged a former feoffment by

him to the plaintiff, and this acknowledgment operated instead of livery of seisin.

- (2.) A fine *sur cognizance de droit tantum*, which was an acknowledgment of the plaintiff's right merely, and occurred when the interest sought to be conveyed was of a reversionary nature.
- (3.) A fine *sur concessit*, whereby, in order to end disputes, an estate *de novo*, usually for life or years, subject to a rent, was granted to the plaintiff.
- (4.) A fine *sur don, grant et render*, which comprehended fines Nos. 1 and 3 before described.

Fines, then, you will bear in mind, were principally used to convey lands of married women and tenants in tail. As you will observe, they were of a very peculiar nature, and one of their peculiarities was that they bound married women notwithstanding their coverture; the husband, however, was a necessary party to the fine, and the wife had to be separately examined by the Court as to her voluntary consent to the proceedings. (This peculiarity also existed with regard to recoveries.) Tenants in tail by levying a fine turned the estate tail into a *base fee*—that is, the tenant barred the rights of his own issue, but not the rights of those in remainder and reversion, who, whenever the issue of the tenant in tail failed, had their right to enter on the lands if the estate tail in respect of which the fine had been levied was of an incorporeal hereditament or of a corporeal hereditament in remainder after an estate of freehold, or their right of action (called an action of *formedon*) if the estate tail was of a corporeal hereditament in possession. There were other purposes for which fines were used, but it is not necessary to enter upon them here, and I pass on to—

2. *Recoveries* (or *common recoveries*, as they were called) resembled fines in that they were fictitious and collusive proceedings, but differed from *fines* since they supposed a suit not immediately compromised but carried on through every regular stage of proceeding. They were invented, as you will remember from the Chapter on Title by Forfeiture, by the ecclesiastics to evade the Mortmain Acts, but they were subsequently used mainly for the purpose of barring estates tail and turning such estates into estates in fee simple absolute. The first instance on record in which estates tail were allowed to be

barred by a recovery is *Taltarum's case*, decided in the 12th year of Edward IV.'s reign.

Supposing the recovery to be brought for the purpose of barring an estate tail, the plaintiff or *demandant* in the action was the real or supposed purchaser from the tenant in tail, who was made defendant. The purchaser alleged that the tenant in tail had no legal title, having succeeded a person who had turned the plaintiff out of the lands; the tenant in tail thereupon called upon a person known as the *common vouchee* (generally the crier of the Court, a mere man of straw), whom he stated to have warranted the title to him on his purchasing the lands; the common vouchee then appeared, and the demandant craved leave to imparl with him in private. The leave was always given, the demandant returning into Court, but the vouchee making default in not reappearing; thereupon the Court gave judgment for the demandant to recover the lands from the tenant in tail, and the tenant in tail to recover as *recompense* or *recovery in value* lands of equal value from the vouchee. The sheriff then delivered the seisin of the lands to the demandant, who became seised for an estate in fee simple in possession by judgment of a Court of Record free from any claim by the issue of the tenant in tail, or by the remaindermen or reversioners. If the estate tail which it was desired to bar were in remainder only, the consent of the persons entitled to the estate preceding the estate tail had to be obtained by vouching them to warranty, and if they would not consent the recovery could not be suffered.

By these means, then—fines and recoveries—estates tail were barred, and the interests of married women conveyed until the 1st January, 1834. Fines, being of a cheaper and equally effective nature for the latter purpose, were usually adopted, while recoveries, being so much more effective for the former purpose, were nearly always resorted to when the necessary consents to them could be obtained. That such collusive and anomalous proceedings should have been so long allowed to be used shows how tardy the legislature formerly was in making alterations in the existing laws.

In the year 1833, however, these cumbrous proceedings were abolished by the well-known Fines and Recoveries Act—a statute which equals, if it does not surpass, all other statutes for the skill with which it is drawn, and the completeness of the provisions which it contains. In lieu of fines and recoveries this statute substitutes a

simple deed of conveyance, by which estates tail may be barred, and married women's interests in real property conveyed. With regard, however, to the barring of the rights of those entitled in remainder or reversion after the estate tail, by a wise precaution the consent of the first tenant for life or years determinable with a life or lives deriving his estate under the same settlement as the entail was created being still required, and to make the conveyance public the deed must be enrolled in Chancery within six months of its execution. And with regard to conveyances by married women, the concurrence of the husband, and the separate examination of the woman as to her free agency, which, as has been mentioned, was required in fines levied by married women, are still required.

A married woman can in equity convey property settled to her separate use by deed (which needs no acknowledgment), or by will, as if a *feme sole*; so under the provisions of the Vendor and Purchaser Act, 1874, she may, just as if a *feme sole*, surrender copyholds or convey freeholds which are vested in her as a *bare* trustee.

#### POINTS TO NOTE.

- I. Whether there was any, and if so what, difference between fines levied *with* and fines levied *without* proclamations.
- II. Whether fines and recoveries (both or either) operated tortiously or not.
- III. What the difference between fines and recoveries was, and how recoveries with single vouches differed from recoveries with double vouches.
- IV. Who the *tenant to the præcipe* was.
- V. On what ground the judges justified the proceedings in recoveries, and why such ground of justification was really absurd.
- VI. What estates tail could not be barred by a recovery.
- VII. Explain an estate tail *ex provisione viri*.
- VIII. What the nature of the deed to *lead* or *declare* the uses of a *fine* or *recovery* was.
- IX. Whose consent to barring the rights of those entitled in remainder and reversion was necessary before the Fines and Recoveries Act was passed, and whose consent is now necessary for the purpose.

- X. Lands being limited to A. for life, then to B. for life, with remainder to C. in tail, and C. wishing to bar the entail, whose consent or consents he would have to obtain; and supposing such consent or consents were withheld, what estate he could acquire.
- XI. Explain the term "Protector to a settlement." The office of protector is a *personal* one—what this means.
- XII. Whether or not a married woman or a person *non compos mentis* can be protector to a settlement, and if so, how the required consent to barring the entail is obtained.
- XIII. Whether the statute 3 & 4 Will. 4, c. 74, enables equitable tenants in tail to bar their estates.
- XIV. Money is directed to be laid out in land, to be settled on A. and the heirs of his body. If A. wishes to deal with the money before it is laid out as directed, whether a deed enrolled under the act will be required.
- XV. What estates tail cannot be barred under the act.
- XVI. Whether estates tail can be barred by (1) a lease and release; (2) a will; (3) a contract; the instrument in each case being duly enrolled in Chancery.
- XVII. What the formalities required by 3 & 4 Will. 4, c. 74, with regard to conveyances of real property by married women are.
- XVIII. The various persons before whom the acknowledgment required by the act may be taken.
- XIX. What the obvious improvements effected by 3 & 4 Will. 4, c. 74, on the old law are.

#### Chapter XX.—Of Devises.

##### REMARKS.

This is a very important Chapter to be well up in for examination purposes. The Chapter only treats of *devises* or *wills* of lands of freehold (not copyhold) tenure, and does not apply to *bequests* or *testaments* of personal property.

The right to devise lands by will is of great antiquity, and has existed in England from very early times; before the Conquest lands, as well as personal property, being capable of free alienation by will.

When, however, after the Conquest the feudal system took root, no man could dispose of his lands by will, excepting in some few places, where burgage or gavelkind tenure prevailed. When, however, a distinction between legal and equitable estates arose by the introduction of uses, a mode to devise lands was adopted by making a feoffment to uses, and then devising the use.

The Statute of Uses entirely stopped this, for, as there was no consideration for the use, a use resulted back to the feoffor, and by force of the statute he remained seised. A man was thus deprived of the power to provide for his wife and younger children by his will; and this fact was alleged as one of the grievances sought to be redressed by the Pilgrimage of Grace—the great Northern rebellion—which took place shortly after the passing of the Statute of Uses. To remedy the evil thus caused by the Statute of Uses, the Wills Act of Henry VIII.'s reign was passed (32 Hen. 8, c. 1), which enabled a man to devise the whole of his lands of socage tenure, and two-thirds of the tenure of knight's service. And when, in Charles II.'s reign, the tenure of all lands was turned into socage, the right to devise lands became complete. By the Statute of Frauds wills of lands were required to be in writing, signed by the testator, and attested by three or four credible witnesses; but now, by the Wills Act, 1837 (1 Vict. c. 26), by two witnesses only.

*As to who may make a Will, of what property a Will may be made, and as to the solemnities to be attended to on the execution of Wills.*

Generally speaking, at the present day any one may make a will; but to this general rule, married women, infants, persons non compos mentis, persons born deaf, dumb and blind, traitors and felons sentenced to death, form exceptions. So any property, whether real or personal, which, if not disposed of, would pass to the testator's heir-at-law or personal representatives may be given by will. All wills, whether of real or personal property (excepting wills of soldiers and seamen of personal property in certain cases), executed after 1st January, 1838, must be executed with the following solemnities:—

- (1.) They must be signed at the foot or end thereof by the testator, or by some one in his presence, and by his direction.
- (2.) The testator must make or acknowledge the signature in the presence of two witnesses at least, present at the same time.



- (3.) The witnesses must attest and subscribe the will in the *testator's* presence.

[N.B.—Not necessarily in each other's presence, although it is advisable that they should do so.]

That the will was so executed should appear in the attestation clause, as then no difficulty occurs when the time arrives for proving the will, while, if the attestation does not show clearly that the formalities required were complied with, an affidavit by one of the attesting witnesses to prove the facts will be necessary. A defective execution of a will is not remedied either at law or in equity, the claimants under the will being mere volunteers. Any one, except a person *non compos mentis*, is capable of being a witness; but if he or she, or his wife or her husband, has any beneficial interest under the will, such interest is forfeited, the will remaining good in other respects.

*As to the Modes in which Wills may be revoked.*

- (1.) By marriage of the testator or testatrix (except the will is made by virtue of a power where the property, if unappointed, would not have passed to the appointor's real or personal representatives).
- (2.) By another will or codicil, or other writing of revocation executed like a codicil.
- (3.) By the testator, or some person by his direction and in his presence, burning, tearing, or otherwise destroying the will. There must be an actual destruction, and it must be done *animo revocandi*; for "no amount of destruction without the intention to revoke, and no amount of intention without the destruction," will operate as a revocation.

[N.B.—The mere fact that a will contains a clause that it is irrevocable does not deprive the testator of his right to revoke it.]

*As to the Construction of Wills.*

Wills are construed less strictly than deeds, as it is presumed that they are often necessarily drawn up in great haste, and very often the testator is without professional advice (*inops consilii*). The following are some of the most important rules:—

- (1.) The testator's intention, if not contrary to law, is to be carried out. And in order to carry out this rule, the following

(*inter alia*) strict rules of law have been made by the Wills Act, 1837, to give way to the testator's presumed intention:

- (i.) Wills speak from the death and not from the date.
- (ii.) All the testator's interest in the property passes to the devisee without any words of limitation. Before the act, although the word "heirs" was never necessary in a will, some words showing an intention to give more than a life estate were necessary.
- (iii.) No lapse occurs from the death of the donee in the testator's lifetime in two cases, viz. (a) when the donee is a child of the testator, and leaves issue living at the testator's death; here the gift passes as if the deceased child had died immediately after the testator; (b) when the gift is of an estate tail, and the tenant in tail leaves issue living at the testator's death capable of inheriting under the entail.
- (iv.) The words "die without issue," or without "leaving issue," or "have no issue," do not mean, as before the act, an indefinite failure of issue, but a want or failure of issue in the lifetime or at the death of the donee. To explain this—supposing, before the Wills Act, real property was given to A., and in case he died without issue to B., the Court held A.'s estate equivalent to an estate tail, which he could at once bar, and so defeat B. of his rights; while, on the other hand, if not barred, although A. had issue, if such issue ever afterwards failed, the rights of B. under the gift arose to take the property. By the new rule, under such a gift A. would take a life estate, and if he had issue the whole estate would vest in him provided his issue did not die before him childless; but if he had no issue living at his death, the lands would go to B.
- (v.) A general devise of lands includes copyhold, customaryhold and leasehold lands of the testator, as well as lands over which he has a power to appoint as he thinks fit.
- (vi.) Devises to trustees or executors pass the whole of the testator's interest in the property unless a definite term of years or an estate of freehold is expressly or impliedly given to them by the will.

- (2.) Where the law forbids the testator's intentions to be carried out to the full, they will be carried out *cy-près*, or as nearly to the intention as the law admits of.
- (3.) Where there are two contradictory clauses in a will, the latter, as showing a change of intention, prevails.
- (4.) In construing wills of real property, the law of the place where the property is situate governs (*lex loci rei sitæ*); while wills of personal property are construed according to the law of the testator's domicile (*lex loci domicilii*).

In connection with what has just been stated, you will bear in mind that the Wills Act, 1837 (1 Vict. c. 26), only applies to wills and codicils executed, or revived, or confirmed after 1st January, 1838; and with regard to the other wills, the old rules as to execution, revocation, and construction apply.

#### POINTS TO NOTE.

- I. What the terms "will," "testament," "codicil," "devise," "bequest," respectively mean, and why wills are said to be of an "ambulatory" nature.
- II. What instances are cited in the Commentaries to show how ancient the right to dispose of property by will is.
- III. Whether or not corporations can take as devisees under a will, and whether the law has always been the same.
- IV. What alteration with regard to wills of infants was made by the Wills Act, 1837.
- V. What the formalities are, which, by the Statute of Frauds, were required to be complied with on the execution of wills, and how far those formalities have been altered by the Wills Act, 1837.
- VI. What the former effect was, and what the present effect is, of (a) an executor, (b) a legatee, (c) a creditor (there being in the will a direction to pay debts), being a witness to a will.
- VII. What the former effect on a will marriage had, and what alteration on the point was effected by the Wills Act, 1837.
- VIII. Wills must be signed at "the foot or end thereof;" what the meaning placed on these words by the Wills Amendment Act, 1852, is (15 & 16 Vict. c. 24).

- IX. How wills may be revived ; and in what way alterations made in a will after execution, to be of any effect, must be verified.
- X. A man by will gives an estate to his heir-at-law after the death of his wife, whether under such a limitation the wife takes any interest.
- XI. In what important ways the rules for the construction of wills and deeds differ.
- XII. A will, executed in 1830, contains a devise to A. B. by the testator of "all his lands and tenements," whether under such a devise A. B. would be entitled to certain leasehold property belonging to the testator, or to certain property over which the testator had a general power of appointment, and whether there would be any difference on this point, if the will were dated in 1840.
- XIII. What an *executory devise* is.
- XIV. What the former effect of giving (a) real property, (b) personal property, to A., but, in case he died without issue, to B. was, and what alteration with regard to such gift has been made by the Wills Act, 1837.
- XV. In what respect or respects an executory devise resembles a conveyance under the Statute of Uses, and differs from a descent.
- XVI. In what counties the registration of documents relating to real estates is required, and what the consequence of an omission to register is.
- XVII. A. conveys land in Middlesex to B. B. does not register his conveyance. A. then sells the same lands to C., who takes care to register his conveyance. Whether B. or C. has priority. And whether the fact of C. having or not having notice of B.'s conveyance will make any difference.
- XVIII. What the provisions relating to the registration of documents contained in the Land Transfer Act, 1875, are.

**Chapter XXI.—Of Extraordinary Conveyance or Conveyances by  
Matter of Record.**

REMARKS.

Two conveyances of this nature (now abolished) have already been treated of, viz. fines and recoveries. There are two others of the same

class which are still used. They are (1) Private Acts of Parliament; and (2) Royal grants.

(1) Private Acts of Parliament are now a common mode of assuring property. They are resorted to for various purposes, and among others for (i) disentangling estates that have been burdened by a complicated mass of uses, &c.; (ii) giving to the tenant of a settled estate power to lease the lands, jointure his wife out of them, or assure them to a purchaser against the remote or latent claims of infants or other persons under disability by settling a proper equivalent upon them proportionate to the interest so barred. These acts are given with great deliberation, and only bind the parties and those whose interests are purchased in the way just mentioned.

(2) Royal grants or grants by the king are contained in charters or letters *patent*, so called because they are not sealed up but exposed to open view, with the great seal pendant at the bottom, and addressed by the sovereign to all his subjects at large, differing in this last respect from other letters of the sovereign, also under the great seal, but directed to particular persons and for particular purposes, which are closed up and sealed on the outside and called *close* writs.

By these royal grants the sovereign may dispose, as he or she thinks fit, of any property purchased by him or her out of the privy purse or coming to him or her by descent from any one not being kings or queens of the realms. The royal domains, however, cannot as a general rule be aliened for longer than thirty-one years.

#### POINTS TO NOTE.

- I. Whether or not private Acts of Parliament are judicially noticed.
- II. What formalities have to be gone through in procuring letters patent from the Crown.
- III. The various ways in which the construction of royal grants differs from grants by private persons.
- IV. Why it is that royal grants are expressed to be made "*ex speciali gratiâ, certâ scientiâ, et mero motu reginæ (aut regis).*"

#### Chapter XXII.—Of Copyholds.

##### REMARKS.

I have already drawn your attention to the origin of copyhold tenure in my remarks in the Chapter on Tenures, and you will

remember from the contents of that Chapter that the present copyholders are "nothing else than villeins, who by a long series of immemorial encroachments on the lord have established a customary right to their estates, which were formerly held entirely at the lord's will;" and I shall only here add the principal points for you to look up; they are:—

## POINTS TO NOTE.

- I. Why it is true (a) that all copyholds must be parcel of some manor ;  
(b) that custom is the life of all copyholds.
- II. Whether there can be either an estate for years, for life, in fee tail, or in fee simple, in copyhold lands.
- III. "The nature of a copyholder's estate resembles that of a freeholder's." What exceptions there are to this rule.
- IV. Whether or not the Statute De Donis (13 Edw. 1), the Statute of Uses (27 Hen. 1, c. 10), or the Dower Act (3 & 4 Will. 4, c. 105), apply to copyhold estates.
- V. By what various acts a copyholder may forfeit his lands to the lord.
- VI. What the various incidents connected with copyhold lands are.
- VII. Under what circumstances "fines" are payable to the lord, and how *certain* and *arbitrary* fines differ.
- VIII. What fines are payable on the admission of coparceners and tenants in common.
- IX. A., B., and C., joint tenants, claim admittance to copyhold property. What fine or fines they will have to pay, and how the amount is reckoned.
- X. What a "heriot" is, and when claimable, and how *heriot service* differs from *heriot custom*.
- XI. What the result is when a copyhold tenement subject to a heriot becomes divided.
- XII. From what liabilities to which freehold lands were liable copyhold lands were free, and how these immunities have by statute law been removed.
- XIII. What is meant by the term "enfranchisement," and how, independently of the Enfranchisement Acts, enfranchisement of copyholds is effected.

- XIV. What (if any) effect on the tenure would be produced by a copyhold tenant conveying his interest to the lord.
- XV. What formalities have to be gone through when copyholds are transferred from one person to another, and how these formalities differ if the transfer is made by way of mortgage or by a married woman.
- XVI. What the nature of (1) a surrender; and (2) an admittance in connection with copyholds is.
- XVII. What the position of a surrenderee of copyholds before admittance is.
- XVIII. In what respects admittances upon surrenders differ from admittances on descent.
- XIX. A. surrenders copyholds to B., but before B. is admitted, A. dies. Whether B.'s right to admittance is gone, and, if not, whether his admittance, when made, will operate from the date of the surrender or from the time of admittance.
- XX. Whether, if a copyhold estate has become extinguished, the lord can grant it out *de novo* to hold by copy, and, if so, whether he must reserve the old services and customs, or whether he can alter them in any way.
- XXI. Why it is that fresh copyholds cannot be created at the present day.
- XXII. What the old law with regard to devising copyholds was, and how affected by 55 Geo. 3, c. 192, and 1 Vict. c. 26.
- XXIII. In what way estates tail in copyholds were barred prior to 1st January, 1834, and how since that date and by what statute the alteration was effected, and whether the statute applies to customary freeholds.
- XXIV. Equitable estates in copyholds can be transferred as a rule by any writing, without deed or surrender. What exceptions there are to this rule.
- XXV. What the principal inconveniences of copyhold tenure are.
- XXVI. What the two main objects of the Enfranchisement Acts, 4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94, were, and what the principal provisions of these Acts are.

- XXVII. What manorial rights cannot be compulsorily enfranchised.
- XXVIII. When copyholds for life or years cannot be compulsorily enfranchised.
- XXIX. Who it is that bears the expense of a compulsory enfranchisement, and how, if the lord and tenant differ as to the compensation to be paid, the amount is ascertained.
- XXX. What the elements of value are which have to be taken into consideration by the Copyhold Commissioners in arriving at a decision as to what sum a tenant must pay for having his copyhold turned into a freehold estate.
- XXXI. On enfranchisement the lands are deemed freehold for all purposes, and cease to be subject to any custom whatsoever. What the exception to this rule is.

#### Chapter XXIII.—Of Incorporeal Hereditaments.

##### REMARKS.

This is a very important Chapter. Incorporeal hereditaments constitute a division of real property, and may be defined as “rights annexed to or issuing out of or exercisable within a corporeal hereditament,” and are distributable either into *profits* or *easements*, and consist of *commons*, *ways*, *watercourses*, *lights*, *franchises* and *rents*. A few words as to each, and first as to—

(1) *Commons*, consisting of certain rights in another man’s land, chiefly of four sorts, viz. :

- (a) *Common of pasture*, the right to feed beasts on another’s land. This is the principal common, and is either *appendant*, *appurtenant*, *because of vicinage*, or *in gross*. This common may be *limited*, that is, confined to particular seasons of the year, or be *unlimited*, that is, last all the year round. A *common in gross* can be limited or unlimited as to number of the animals. If unlimited it is called a common *without stint*, or *sans nombre* ; but the other kinds of common of pasture must be claimed in respect of some limited number of beasts.
- (b) *Common of piscary* is a liberty of fishing in another man’s waters.
- (c) *Common of turbary*, a liberty or right annexed to a house to cut turf for fuel to be used in that house. This cannot be claimed as annexed to land.



- (d) *Common of estovers* (from *estoffer*, to furnish) is the right to cut wood for fuel (firebote), repairing the house (housebote), or ploughs or other instruments of husbandry (ploughbote), and for the necessary fences of his grounds.

To these four commons may be added—

- (e) *Common in the soil*, the liberty of digging for minerals in another man's lands, and  
 (f) *Common of folding*, the liberty of folding sheep on another's land.

These rights of common generally exist in connection with copyhold lands. By the Statute of Merton (20 Hen. 3, c. 4) the lord of the manor was allowed to enclose against common of pasture as much waste as he pleased, so that enough were left for the purpose of those entitled to it. Under subsequent statutes, known as the General Inclosure Acts, and passed principally in the present reign, the inclosure of commons takes place under the superintendence of the Inclosure Commissioners.

(2) *Ways*, or rights of going over another man's lands. These rights arise by grant, prescription, custom, or implication.

(3) *Watercourses*, or rights to the flow of a river or stream (not navigable), when the bank on one side or both sides belongs to the claimant. The claimant has the right to have the course of the stream kept clear from interruption, whether by diversion, pollution, or obstruction by the owners of the land above or below him.

(4) *Lights*, a man's right to have the access of the sun's rays to his windows free from obstruction on the part of his neighbours. The right can be claimed by grant or prescription, but unless a title by one of these means has been obtained, a man has a perfect right to build and intercept the light which another man's house would have otherwise had.

(5) *Franchises*, these are royal privileges, or branches of the crown's prerogative in the hands of a subject, arising by royal grant or by prescription.

A county palatine is a franchise vested in a number of persons. So *incorporated bodies*, *courts leet*, the right to *waifs*, *wrecks*, *estrays*, *royal fish* and *forfeitures* are franchises. So, too, are *fairs*, *markets* and *ferries*. These last three arise by grant, prescription, or act of parliament. No toll can be imposed in respect of them unless for an adequate consideration, *e. g.* by keeping a ferry-boat, providing

grounds, &c. for the public, and the tolls must in all cases be reasonable. The owner is liable to a criminal indictment if he obstruct the public in the proper use of the market, &c.; while at the same time he has the right to bring an action for unpaid tolls, and to proceed against any one who sets up a market, fair, or ferry so near his as to diminish his custom. So *forests, chases, parks, warrens, and fisheries* are instances of franchises. A *forest* is the right of keeping animals of warren, chase and park in a space set apart, with peculiar officers and laws to regulate it. A *chase* is the right to keep animals of chase (buck, doe, fox, martin and roe) and warren within a certain district, while a *park* is nothing more than an enclosed chase. A *warren* is the right to keep beasts and fowls of warren (hare, coney, roe, partridge, quail, rail, pheasant, woodcock, mallard and heron, &c. according to Coke, but hare, coney, partridge and pheasant only according to Manwood). A *fishery*, or free fishery, is the exclusive right of fishing in a public river; and as by the Magna Charta the Crown is expressly forbidden to make grants of this description, it must be claimed under some grant dated prior to June, 1215.

(6) *Rents*, or returns, (consisting of moneys, chattels, or services,) yielded periodically, to a certain amount, out of the profits of corporeal hereditaments by the tenant thereof. From this definition you will see that the following are the requisites to a rent—(a) It must be yielded, *i. e.* paid by the tenant, therein differing from commons, which the claimant must take himself,—hence rents lie *in render*, commons *in prendre*; (b) The amount must be certain, or capable of being made certain; (c) It must be payable *periodically*; (d) The payment must be out of the *profits*, and not out of the land itself; (e) It must issue out of corporeal hereditaments; (f) It must be due from the tenant of the land.

Rents are principally of three kinds, viz. :—

- (i.) *Rent-service*, which accrues in connection with tenure, and is due from a tenant owing fealty to his lord. The common law gives the lord the important right of distress. Rent-service can only exist as incidental to the reversion, and cannot be created by way of subinfeudation.
- (ii.) *Rent-charge*, which is a sum payable out of land under a deed reserving the rent to some person, and giving to such person an express power of distress, and usually a condition of

re-entry as well. This rent is independent of tenure, and is called a rent-charge, because charged with a distress.

- (iii.) *Rent-seck*, a mere dry or barren rent, for which neither by the common law nor by grant a right of distress attached. A power of distress was, however, given for such rents by 4 Geo. 2, c. 28, and a power of re-entry is given by 44 & 45 Vict. c. 41. See *post*, p. 100.

Rents are called (a) *rents of assize*, when paid by freeholders (when they are also called *chief rents*) or by copyholders to the lord. They are fixed by immemorial custom, and as by paying the tenant is free from all other services they are called *quit-rents*; (b) *fee farm rents*, where a quarter of the yearly value is reserved in a grant in fee, and (c) *rack-rents*, when they are the full yearly value of the land or near it.

#### POINTS TO NOTE.

- I. Whether or not either common appendant or common appurtenant can be created at the present time.
- II. What the terms "commonable beasts," "common because of vicinage," "common of shack," respectively mean.
- III. What the chief provisions of 8 & 9 Vict. c. 118, as to inclosing commons are.
- IV. The various ways in which rights of way arise.
- V. When a right of way is said to be *in gross*, and when *appurtenant*.
- VI. How a right of watercourse may be lost.
- VII. In what way or ways *free fisheries* differ from *commons of piscary*.
- VIII. Whether or not it is necessary for the proprietor of a ferry to be owner of the water on which he carries, or of the soil on the side where he embarks and disembarks his passengers.
- IX. Whether or not annuities or rent-charges must be registered or inrolled.
- X. In what way or ways (1) a rent-charge; (2) a rent-seck; (3) a rent-service may be created.
- XI. When and where rent, in the absence of special agreement, is payable, and whether the rule is the same when the rent is payable to the Crown.
- XII. Whether rent is apportionable or not, and how far the statutes 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22, and 33 & 34 Vict. c. 35, affect the law of apportionment of rents.

- XIII. What the distinction between incorporeal hereditaments *appurtenant*, *appendant*, and *in gross* is. And what is meant by the expression that "hereditaments corporeal cannot be appendant or appurtenant to corporeal, nor incorporeal to incorporeal."
- XIV. In what important respects incorporeal hereditaments (a) resemble, (b) differ from, corporeal hereditaments.
- XV. The various ways in which commons (or *profits à prendre*) and easements may respectively be created.
- XVI. What a title by *prescription* means, and how prescription differs from *custom*.
- XVII. What was necessary to create a good prescriptive title at common law.
- XVIII. A man at common law might prescribe "in himself and his ancestors" or "in a *que estate*." What the difference of these prescriptions was.
- XIX. What franchises can, and what franchises cannot, be prescribed for.
- XX. How the law of prescription was affected by 32 Hen. 8, c. 2.
- XXI. What the provisions of 2 & 3 Will. 4, c. 71, relating to the law of prescription are. With what object this act was passed, and how that object is carried out.

[N.B.—At common law, in order to acquire a title by prescription, the following things, among others, were requisite:—(1) There must have been actual usage of the thing prescribed for, and the enjoyment of it must have been *constant* and *peaceable*; (2) The usage must have been *certain* and *reasonable*; (3) The thing prescribed must have been capable of being created by grant (a title by prescription being based on a supposed lost grant); (4) The usage must have been from time *immemorial* (*i. e.* from commencement of Richard I.'s reign); but possession for twenty years was *prima facie* evidence of this usage, unless other testimony was forthcoming to show the time at which the usage commenced. Now, however, by the Prescription Act of 1832 (2 & 3 Will. 4, c. 71), if a person can show that he has uninterruptedly enjoyed a *common* (or other *profit à prendre*) in another's land for *thirty*

years, he will have a good prescriptive title, unless the person out of whose lands he claims the right can prove that the usage was without his knowledge, or enjoyed while he was under some disability, when *sixty* years' enjoyment must be proved to make the claimant's title indefeasible. With regard to *easements*, twenty years' enjoyment gives a presumptive title by prescription, and forty years an indefeasible title. With regard to rights to light and air, however, twenty years in all cases gives an indefeasible title.]

XXII. How incorporeal hereditaments may be extinguished.

**Chapter XXIV.—Of recent Provisions for the Protection of Purchasers and Mortgagees against Insecure Titles.**

REMARKS.

It is hardly likely that questions at the Examination will be asked on this Chapter.

Of the three statutes treated of, 25 & 26 Vict. c. 53; 25 & 26 Vict. c. 67, and 37 & 38 Vict. c. 87, the last is by far the most important, and the following epitome will be useful in drawing your attention to its chief features:—

38 & 39 Vict. c. 87 (*Land Transfer Act*, 1875).—This Act was passed with a view of simplifying titles, and facilitating the transfer of land by establishing a Land Registry with proper officers. The Act contains five parts. Part I. shows (a) who is entitled to register under the Act; (b) on registration the proprietor is entitled to a "Land Certificate," showing the value of his title; (c) the mode in which leasehold interests are to be registered. Part II. relates to registered dealings with registered lands. All transfers of registered property to be entered on the register and to rank in order of their entry. Part III. relates to unregistered dealings with registered lands, and provides for registering notice of leases and of estates in dower and by the curtesy, and gives the Court or registrar powers to forbid dealings with registered land. Part IV. contains provisions of a supplemental and general nature relating to registration under the Act. Part V. establishes an office of Land Registry with various officers, prohibits further registration under 25 & 26 Vict. c. 52, and provides that lands in register counties registered under the Act need not be registered in the local registries.

Registration under the Act being entirely voluntary, its provisions have been but little taken advantage of.

#### TEST PAPER TO WORK OUT.

1. Give a list of conveyances operating (a) at common law, (b) under the Statute of Uses, and explain, with reference to common law conveyances, the difference between *primary* and *secondary* conveyances.

2. Explain the nature of a conveyance by lease and release. What led to this mode of conveying lands being adopted, and why is it now so rarely used?

3. A. by deed of grant conveys land to B. to the use of C.; who has the legal estate, and why? Would your answer be the same if the deed had been a bargain and sale?

4. Contrast fines and recoveries in their form and effect, and state for what purposes they were principally used, when they were abolished, and what was substituted in their stead.

6. Lands are limited to A. for life, then to B. for life, remainder to C. in tail, remainder to D. in fee. C. wishes to bar the entail, whose consent will he require, and supposing such consent is withheld, what estate can he acquire in the lands?

7. With what formalities must conveyances of real property by married women be executed? Must the same formalities be observed if the property is settled on the woman for her separate use?

8. What are extraordinary conveyances? and by what other name known?

#### Fifth Week's Work.

During the week analyse from the text book the following important Statutes:—

13 *Edw. 1, c. 1* (*The Statute De Donis*), creating strict entails.

18 *Edw. 1, c. 1* (*The Statute Quia Emptores*), creating subinfeudation and allowing lands to be freely aliened.

27 *Hen. 8, c. 10* (*The Statute of Uses*), turning uses into possession.

27 *Hen. 8, c. 16* (*The Bargain and Sale Inrolment Act*), requiring bargains and sales of freehold estates to be inrolled.

32 *Hen. 8, c. 1* (*The Wills Act*). The first statute allowing the alienation of lands by will.

13 *Eliz. c. 5*.—Conveyances made to defeat creditors void.

- 27 *Eliz. c. 4.*—Conveyances made to defraud purchasers void.
- 3 *Chas. 1 (The Petition of Rights).*
- 12 *Chas. 2, c. 24 (Abolition of Feudal Tenures).*
- 29 *Chas. 2, c. 3 (The Statute of Frauds).*
- 31 *Chas. 2, c. 2 (Habeas Corpus).*
- 9 *Geo. 2, c. 36 (The Mortmain Act).*—Lands can only be given to charities by deed.
- 39 & 40 *Geo. 3, c. 98 (The Thellusson Act).*—Income cannot be accumulated beyond a certain period.
- 3 & 4 *Will. 4, c. 71 (The Prescription Act).*—Thirty years' enjoyment of a common and twenty years of an easement gives a good prescriptive title.
- 3 & 4 *Will. 4, c. 74 (Fines and Recoveries Abolition Act).*
- 3 & 4 *Will. 4, c. 104.*—The lands of a deceased debtor are liable at law for payment of all his debts, simple contract as well as specialty.
- 3 & 4 *Will. 4, c. 105 (The Dower Act).*—Dower of women married on or after 1st January, 1834, only attaches to lands of which the husband dies seised intestate. It attaches to equitable as well as legal estates.
- 3 & 4 *Will. 4, c. 106 (The Inheritance Act).*—Laying down certain rules of descent.
- 7 *Will. 4 & 1 Vict. c. 26 (The Wills Act).*—Wills of realty and personalty to be executed and construed alike; many other alterations as to wills.
- 8 & 9 *Vict. c. 106 (The Real Property Amendment Act).*—A very important statute, providing (*inter alia*) that (1) corporeal hereditaments shall lie in grant as well as in livery; (2) feoffments (except those made by infants by custom of gavelkind), partitions, leases required by law to be in writing, assignments of chattel interests, surrenders, &c., shall be by deed; (3) feoffments shall have no tortious operation; (4) partitions and exchanges shall imply no condition; (5) a benefit in real property under a deed can be taken by a person who is not a party to the deed; (6.) contingent remainders to be capable of taking effect notwithstanding the determination of any preceding estate of freehold by merger, surrender, or forfeiture, &c., &c., &c.
- 8 & 9 *Vict. c. 112 (Satisfied Terms Act).*—Satisfied terms to cease and attend the inheritance.

- 14 & 15 *Vict. c. 25 (Emblements Act)*.—Under-tenants at rack rent instead of emblements to hold over till the end of the current year.
- 32 & 33 *Vict. c. 46 (Hinde Palmer's Act)*.—Specialty and simple contract creditors to share equally in the estate of their deceased debtor.
- 33 *Vict. c. 14 (Naturalization Act)*.—Aliens can hold property as British subjects.
- 33 & 34 *Vict. c. 23 (Felony Act)*.—No attainder or corruption of blood to arise from conviction for treason felony, or *felo de se*.
- 38 & 39 *Vict. c. 92 (Agricultural Holdings Act)*.—Tenants of agricultural or pastoral tenancies are entitled to be paid for improvements made. Yearly tenancies under the act to be determined by a year's instead of six months' notice. The act may be and usually is excluded.
- 40 & 41 *Vict. c. 18 (The Settled Estates Act)*.—Settled estates can be leased by the tenant for life for twenty-one years with the formalities set out *ante*, in Chap. IV. By order of the Court they can be leased for a longer period or sold.
- 40 & 41 *Vict. c. 33 (The Contingent Remainders Act)*, passed to prevent a contingent remainder being lost by reason of the particular estate coming to an end before the contingency happened. To explain: if lands are granted to A. for life with remainder to A.'s son in fee on his attaining twenty-one, before the act, unless A.'s son attained twenty-one before his father died, he did not take the estate, even though he subsequently attained the age; now, by the effect of this act, in the event of A. dying before his son attained twenty-one, the fact of there being no particular estate to support the remainder will not prevent the remainder taking effect when the contingency happens, namely, on A.'s attaining majority.
- The act thus creates an exception to the rule laid down in the Commentaries, that every contingent remainder must become vested during the continuance of the particular estates or *eo instanti* that it determines.
- 44 & 45 *Vict. c. 41 (Lord Cairns' Conveyancing Act)*.—The following are some of the most important provisions of the Act, as far as it bears on Volume I. of the Commentaries:—



- (a) All the usual covenants in conveyances, mortgages, and settlements are implied, provided the person against whom implied conveys as "beneficial owner" or "as settlor." (Sect. 7.)
- (b) Powers of sale, to appoint a receiver, to insure, and to fell timber, are conferred on mortgagees. A power of leasing is also conferred on mortgagor and a mortgagee while in possession. The lease not to exceed twenty-one years, or ninety-nine years if a building lease. On death of a mortgagee, whether testate or intestate, the legal estate vests in his personal representatives. (Sects. 18—24, 30.)
- (c) A fee simple estate may in future be created by deed, by conveying to the grantee "in fee simple," without the word "heirs," and a fee tail by conveying "in fee tail," without the words "heirs of the body." (Sect. 57.)
- (d) The heir is subject to the ancestor's debts, whether he is named in the bond or not. (Sect. 58.)
- (e) When a rent (not being a rent incident to the reversion) is in arrear for twenty-one days, a power of distress is given to the person entitled to the rent; and if in arrear for forty days a power to enter and take the profits without liability for waste; and a power to raise by way of mortgage or sale, or other reasonable means the amount due. (Sect. 44.)
- (f) The word "grant" is not to be necessary to convey either corporeal or incorporeal hereditaments. (Sect. 49.)
- (g) A man may transfer all kinds of property directly to himself and another, or to his wife, and so a wife to her husband, without the necessity, in the case of real property, of the intervention of a conduit pipe trustee. (Sect. 50.)
- (h) The receipt in the body of a deed is sufficient without a receipt indorsed. (Sect. 54.)
- (i) Lands may be granted to the use that a certain person may have an easement over it. (Sect. 62.)
- (j) General words are deemed implied in every conveyance, mortgage, lease, settlement, and other assurance.

The provisions of the Act, to which further reference will be subsequently made, are for the most part prospective only, and may be generally excluded by words showing the intention to exclude the Act.

## VOLUME II.

## Sixth Week's Work.

## BOOK II.

## PART II.—OF THINGS PERSONAL.

CHAPTER I.—*Of Things Personal in General, and of Property therein.*,, II.—*Of Title to Things Personal, and first of Title by Occupancy.*,, III.—*Of Title by Invention.*,, IV.—*Of Title by Gift and Assignment.*,, V.—*Of Title by Contract.*Chapter I.—*Of Things Personal in General, and of Property therein.*

## REMARKS.

Personal property is divided into *choses* (or things) *in possession*, and *choses* (or things) *in action*.

*Choses* in possession are again subdivided into (a) *chattels real*, or leaseholds, and (b) *chattels personal*, or, as they are sometimes called, *pure personalty*.

The necessary information connected with chattels real was given you in the Chapter on "Estates less than Freehold," in Vol. I. of the Commentaries; the first part of Vol. II. is devoted to the other class of personal property, viz. :—

**Chattels Personal.** These may be divided into the three following classes, viz. :—

- I. All inanimate things, such as money, clothes, furniture, vegetable productions, when they fall under the head of emblements, or when actually severed from the land.
- II. Animals, which again are sub-divided into two classes, (i) those which are *domitæ*, or tame domestic animals, *e. g.* horses, kine, sheep, and the like; and (ii) those which are *feræ naturæ*, or of a wild disposition, *e. g.* deer and other game. In the former, a person may have as absolute an ownership as in any inanimate thing; but with regard to the latter, the property is qualified only, and arises from one of the following causes :—
  - (a) By the industry of the owner, or *per industriam*, as it is called, occurring where a person reclaims animals

by taming or confining them, *e. g.* doves in a dove-house, bees hived, partridges in a mew, &c.

(b) The weakness of the animal itself, or *per impotentiam*, as it is called, occurring where the animal is so young or weak that it cannot escape.

(c) By privilege, or *propter privilegium*, as it is called, occurring where a person is privileged to hunt and take certain animals to the exclusion of others.

III. Incorporeal rights, growing out of personal property, and consisting of (*inter alia*) *patent right* and *copyright*, to which a separate Chapter is devoted. (See *post*, p. 106.)

The property in personal chattels may be, as already mentioned, either in *possession* or in *action*. The property is said to be in possession when the owner has the enjoyment, either actual or constructive, of the chattel, and is divided into *absolute* and *qualified*. The property is absolute when the owner is completely the proprietor of the thing, and it is qualified when his ownership is of a limited or special kind, *either* because the subject-matter of the property is not in itself capable of absolute ownership, as in the case of animals *feræ naturæ*, already spoken of, *or* because of the peculiar circumstances of the owner, the thing itself being perfectly capable of absolute ownership, as in the case of the delivery of goods to a carrier to carry to London and deliver to the third person to keep for the owner. In such a case there is not an absolute property either in the person delivering (the bailor), for he has only the right, and not the immediate possession, or in the person to whom the delivery is made (the bailee), for although he has the possession, he has only a temporary right; and in such a case there is a qualified property in both bailor and bailee.

The property is said to be in *action* when the owner has no actual or constructive enjoyment of the thing, but merely a right to take proceedings to recover the possession of it. A chose in action is indeed more than this, for the term includes, and is properly applied to, as shown in the Commentaries, the right to bring an action for damages, or to recover a chattel.

If the action must be brought in the Chancery Division of the High Court, the chose is properly called an *equitable* chose in action, *e. g.* a legacy; while, if the action must be brought in one of the Common Law Divisions of that Court, the chose is properly called a *legal* chose in action, *e. g.* a debt.

Although formerly there could be no future property in personal chattels, and if such chattels were assigned to A. for life, with remainder absolutely to B., B. was not entitled to any interest in the chattels, the ownership of which absolutely vested in A., there can be at the present time, and, under the assignment just mentioned, A. would be entitled to the use of the chattels for his life only, and on his death B. could claim them, and B.'s right, which, owing to the destructible nature of a personal chattel, is of a precarious nature, would be protected in equity by means of an injunction to prevent A. wrongfully dealing with the chattels, or such other remedy as the court might think B. entitled to. There is one case, even at the present day, in which there can be no future property in personal chattels, namely, when the chattel is of a consumable nature, *e. g.*, food, wines, and the like, or things which *quæ ipso usu consumuntur* (which by their very use are consumed); and if such chattels are given to A. for life, remainder to B., A. becomes absolutely entitled to them.

With regard, then, to the time of enjoyment, personal chattels resemble real property, *i. e.*, the enjoyment of them may be either *in præsentia* or *in futuro*—in possession or in expectancy. They also resemble real property (a) in that they may be held by joint tenants and tenants in common, though they differ from real property inasmuch as they cannot be held by coparceners; (b) in that they can be vested in one person (the trustee) for the benefit of another (the *cestui que trust*); (c) in that the rules regulating the time for the arising of future interests, and for accumulating the income of them (rules which were fully explained in Volume I.), apply equally to them.

#### POINTS TO NOTE.

- I. Why it was that in the olden times personal property passed almost unnoticed.
- II. Whether the following property will on the death of the owner go to his heir or devisee, or to his executor or administrator:  
Deer in a park, bees in a hive, fish in a pond, rabbits in a warren.
- III. Under what circumstances a property *per industriam* in wild animals ceases.
- IV. Whether or not proceedings, civil or criminal, can be taken against a person who detains or steals animals *feræ naturæ*, in

which a property *per industriam*, has been acquired ; and how far the position is affected by 24 & 25 Vict. c. 96, s. 21.

- V. Whether or not the following persons have any property in the goods in their hands :—(a) A finder of goods ; (b) a servant in charge of his master's goods ; (c) a landlord in goods distrained for rent but not yet sold.
- VI. Whether or not there can be estates in personal chattels.
- VII. Supposing personal chattels are limited to A. and the heirs of his body, what interest A. takes in the property.
- VIII. Whether if partners purchase personal property they are considered as joint tenants or tenants in common of it ; or, whether if a debt is due to several partners they are considered as joint tenants or tenants in common of it at law or in equity.

#### Chapter II.—Of Title to Things Personal—Title by Occupancy.

##### REMARKS.

The title or right to personal property may be acquired, and, as a natural consequence, lost also, in one of six different ways, viz. :—(1) by occupancy ; (2) by invention ; (3) by gift and assignment ; (4) by contract ; (5) by bankruptcy ; (6) by will and administration— all of which modes are considered in the Commentaries and in the order given.

This Chapter treat of title by occupancy, a rare mode of acquiring and losing personalty at the present date, for when things are now found without any other owner they generally belong to the Sovereign by virtue of the royal prerogative. In the following cases a title by occupancy may still be acquired by a private subject, viz. :—

- (a) Where goods belonging to an alien enemy are legally seized.
- (b) When animals *feræ naturæ*, either on land, if not already reclaimed, or in the sea, are captured, This is subject to the game laws.
- (c) When animals breed. Here a title by accession granted on the right of occupancy is acquired. The animals being tame and domestic the brood belongs to the owner of the mother, the maxim being *partus sequitur ventrem*, and the reason apparently being that the dam pending pregnancy, or at least during a great portion of pregnancy, is

useless to her owner, who ought consequently to profit by the brood : an exception occurring in the case of young cygnets, which belong equally to the owners of the cock and hen.

(d) When goods of different persons become intermixed and confused, the person by whose act the intermixture takes place loses his portion of the goods ; and the other person acquires a right to such portion, provided he has not interfered to cause the confusion. No such title is, however, lost and acquired if the goods can be distinguished, or if it can be clearly shown which portion belongs to each party.

#### POINTS TO NOTE.

- I. Whether or not if a foreigner resides in England and war breaks out between our country and his own, a title to his goods can be acquired by the person who first seizes them ; and whether if he during the time of peace made a contract with a British subject which the latter broke, the fact of war so breaking out would altogether defeat his right of action for such breach.
- II. What the requisites are to vest property taken from an alien enemy in the captors, and whether there is any difference in these requisites if the property captured happened to be a ship or the goods are taken at sea.
- III. What salvage is.
- IV. What the nature and jurisdiction of the *Prize Court* is.
- V. What exceptions exist in our law to the general rule that "all men may take any fowl of the air, any fish or inhabitant of the water, any beast or reptile of the field."
- VI. What qualifications were formerly necessary to enable a man to take or sell game, and how the question has been affected by the Game Act (1 & 2 Will. 4, c. 32).
- VII. How the word "game" is defined in the Game Act referred to.
- VIII. What provision with regard to killing hares is made by 11 & 12 Vict. c. 29, and 23 & 24 Vict. c. 90, and 43 & 44 Vict. c. 47.
- IX. To whom the partridge in the following cases will belong :—  
 (Case A.) Smith, being on his own land, starts a partridge thereon, follows it on to Brown's land and kills it there.  
 (Case B.) Smith, being on Brown's land (as a trespasser),

starts a partridge thereon and kills it there. (Case C.) Smith, being in Brown's chase, starts a partridge and follows it into Jones's liberty and there kills it.

- X. What in connection with the title by accession the meaning of the maxim "*Si equam meam equus tuus pregnantem fecerit, non est tuum sed meum quod natum est*" is (see post, Appendix A.).
- XI. Why in the case of young cygnets an exception occurs to the maxim "*Partus sequitur ventrem.*"
- XII. How the civil law differs from our own law with regard to a title acquired to goods by their becoming confused.
- XIII. A. makes wine with grapes belonging to B.; to whom the wine belongs, and why.

### Chapter III.—Of Title by Invention.

#### REMARKS.

In this Chapter you will find the law of patent right and copyright—two rights which are acquired by *invention*, *i. e.* by the original conception of genius—fully treated of. A few words with regard to each of these rights may assist you in understanding what you will perhaps find rather a difficult subject; and first as to—

**I. Patent Right**—*i. e.* a favour conferred by royal grant (or letters patent from the Crown) to an inventor to use for his own benefit exclusively during a limited period of fourteen years (extendible) his invention.

A person applying for letters patent to protect his invention must be prepared to show the following facts:—

- (a) That the invention is a manufacture, *i. e.*, some article fabricated by the hand of man, or some improvement in an already existing manufacture.
- (b) That the manufacture or improvement is *new*, or at any rate has never been used in *this* country before.
- (c) That the invention is not (i) contrary to law; (ii) mischievous to the State; (iii) to the hurt of trade; (iv) generally inconvenient.

If two persons discover the same invention simultaneously, the first who patents it obtains the benefit of it. Patent rights may be assigned, but the assignment must be by deed; and, instead of

entirely alienating, the patentee may, if he think fit, grant deeds of licence to others to manufacture the article. These assignments and licences must be completed by being registered in a book kept at the Specification of Patents Office, and called the "Register of Proprietors."

If any third person infringes the patent right, the patentee has the following remedies:—(a) An action for damages for the injury sustained; (b) an action for an injunction to prevent a continuation of the infringement. In addition, any one using the name, stamp, or mark of any patentee is liable to forfeit for every offence a sum not exceeding 50*l*. Proceedings for infringements of patents may be resisted on one of the following grounds:—(a) That no infringement has taken place; (b) that the patent was invalid, either because the patentee was not the first and true inventor, or that the article was not a fit subject for a patent.

In addition, and even though there be no infringement, an action of *scire facias* may be instituted by the Crown, or by any private subject, with the Attorney-General's leave, for the formal impeachment of the patent.

Secondly, as to—

**II. Copyright**—i. e. the right of an author, to the exclusion of everyone else, to print and publish his own work. There is no certain evidence that this right existed at all at common law, though probably it did in some limited form. The right, however, was firmly established by a statute passed in Anne's reign (8 Anne, c. 19), and was extended by two statutes passed in George III.'s reign, all of which statutes have been repealed by the Copyright Act, 1842 (5 & 6 Vict. c. 45), the principal statute now regulating the law of copyright.

With reference to this statute, and subsequent amending and enlarging statutes, you must bear in mind the following points in connection with the law of copyright:—

(a) A copyright, if published while the author is alive, lasts during his life and for seven years afterwards, or for forty-two years from publication, whichever is the longer period.

(b) If published after the author's death, the right lasts for forty-two years from publication.

(c) In case (b) the right belongs to the owner of the manuscript.



(d) The right extends not only to books but to every volume, part or division of a volume, pamphlet, sheet of letter-press, or music, map, chart, or plan separately published; to musical and dramatic pieces; to lectures also, if the lecturer give a written notice of his intention to deliver the lecture to two justices of the peace residing within five miles of the place where the lecture is given; to engravings and prints, sculptures, models, casts, and copies, designs for articles of ornament and utility, paintings, drawings, and photographs.

(e) The right does not extend to immoral, blasphemous, seditious, or libellous works.

(f) The author's remedies for any breach of his right are by action for an injunction, with or without damages.

(g) The action must be brought within twelve calendar months from the breach.

(h) The action is not maintainable unless the author has registered his work at Stationers' Hall.

(i) Works printed abroad, and imported into this country to the prejudice of an English author's rights, are forfeited to her Majesty's Customs, and the importer is liable to a penalty of ten pounds and double the value of every copy imported.

(j) If after an author's death the owner of the copyright refuses to republish it, application may be made by any person to the Judicial Committee of the Privy Council to publish it.

(k) The exclusive right of printing bibles, prayer-books and acts of parliament is vested in the crown and its grantees. In addition to this prerogative copyright, the crown has a right by purchase to copies of all law books, grammars, and other compositions compiled or translated at the crown's expense.

(l) The universities of Oxford and Cambridge, and the colleges of Eton, Westminster and Winchester, have the right to print at their own press all books the copyright of which has been bequeathed to them respectively in perpetuity.

(m) The author may assign his right to a third person. The assignment must either be by deed, or be registered at Stationers' Hall.

(n) Assignments of copyright, when registered at Stationers' Hall, require no stamp.

## POINTS TO NOTE.

- I. What the term "monopoly" at Common Law means.
- II. What the necessary proceedings are to obtain letters patent, and what advantage is derived by the applicant's filing with his petition a "complete" instead of a "provisional" specification.
- III. What the means are by which an application for a patent may be resisted by a third person.
- IV. What the effect is if no proper specification is filed, and what object the law, in requiring this specification to be filed, has in view.
- V. What the rules are with regard to the sufficiency or otherwise of the specification.
- VI. Under what circumstances the original period of fourteen years granted to a patentee may be extended. How and when the application for such an extension must be made.
- VII. With what object a patentee sometimes files in chancery a disclaimer.
- VIII. What provisions for the protection of patentees was contained in 5 & 6 Will. 3, c. 83, s. 2.
- IX. What notice a defendant in an action for breach of copyright must give the plaintiff under sect. 16 of 5 & 6 Vict. c. 45.
- X. What the provisions of 7 & 8 Vict. c. 12, 15 & 16 Vict. c. 12, and 25 & 26 Vict. c. 68, respecting International Copyright are. Whether these acts prevent a translation of foreign works being published here.

## Chapter IV.—Of Title by Gift and by Assignment.

## POINTS TO NOTE.

- I. The exceptions which exist to the general rule that all personal property can be transferred.
- II. On what principle it is that officers of the army and navy are not allowed to assign their pay.
- III. What a "chose in action" is, why the law would not allow them to be assigned, and how the legal rule was evaded.

- IV. What choses in action were assignable at law previous to "The Judicature Act, 1873;" and what provision respecting the assignment of these choses was contained in section 25 of that act (sub-section 6).
- V. By what two modes personal chattels may be transferred from one person to another.
- VI. What gifts of personal chattels are void under 3 Hen. 7, c. 4, and 13 Eliz. c. 5.
- VII. Whether or not it is in all cases necessary to the validity of a gift that it be evidenced by deed.
- VIII. Supposing A. executes a deed of gift in favour of B., and reserves to himself no power of revocation, whether he can revoke it or not.
- IX. What the requisites are to constitute a good "*donatio mortis causa*," whence we derived such a gift, and how it resembles and how it differs from a legacy.  
[N.B.—These gifts are subjected to probate duty by 44 & 45 Vict. c. 12.]
- X. In what cases writing is necessary to the validity of assignments of personal property.
- XI. What a "bill of lading" is, and how affected by 18 & 19 Vict. c. 111.
- XII. Why it is desirable, although not strictly necessary, that goods, the subject of an assignment, should be actually handed over to the assignee, particularly having regard to the provisions of 13 Eliz. c. 5.
- XIII. Supposing A. to have obtained judgment against B., and issued execution thereon, and after execution issued and before seizure thereunder by the sheriff, B. sold his goods to C., whether C. would take the goods subject to the judgment or not. How far the question is affected by 29 Car. 2, c. 3, s. 16, and 19 & 20 Vict. c. 97, s. 1.
- XIV. What a bill of sale is. What the provisions of the Bills of Sale Act, 1878, are respecting the formalities to be observed in connection with the execution and registration of bills of sale, and what the result is if these formalities are not complied with.
- XV. In what cases a person can transfer a better title to goods than he himself had in them.

XVI. Why it is that if A., having stolen money or a negotiable instrument from B., transfers it to C., who has no notice of the theft, that B. cannot follow it into C.'s hands.

#### Chapter V.—Title by Contract.

##### REMARKS.

This is a very important Chapter for examination purposes, and I would impress upon you the necessity of getting up every point touched upon in it.

In this Chapter the author of the Commentaries first gives some rules respecting contracts generally, and then considers particularly the following contracts:—(1) Contract of Sale; (2) Bailment; (3) Contract of Loan; (4) Contract of Partnership; (5) Contract of Guarantee; (6) Contract by Bond; (7) Bills of Exchange and Promissory Notes; (8) Policies of Assurance; (9) Charter-parties. Pursuing this course, the first matter for consideration is—what are the general rules in connection with contracts? and they may be shortly stated as follows:—

(a) Contracts are divided into—(i) Contracts by Record; (ii) Specialty Contracts; (iii) Simple or Parol Contracts.

(b) Contracts are also divided into—(i) *Express* and *implied* contracts, according to whether the terms between the parties are openly agreed upon between them, or rest on construction of law. Thus, if A. agrees to work for B. for 5s. a day, this is an express contract, while if no agreement as to wages was made the law would imply that there was a contract on B.'s part to give and on A.'s part to receive a reasonable remuneration for his (A.'s) work. (ii) *Executed* and *executory* contracts, according to the time of the performance of the contract, *e.g.* if A. and B. agree to exchange horses, and do so, there and then the contract is executed; if they agree to do so a week hence, the contract is executory.

(c) Simple or parol contracts are void unless made for some *valuable* consideration, the maxim being *ex nudo pacto non oritur actio*; but contracts of record and specialty contracts import a consideration. Suppose, therefore, A. promises by word of mouth, or by writing not sealed, to give B. 100*l.*, B. cannot compel A. to carry out his promise unless he can show that there was some valuable consideration inducing the promise; while had the promise been contained in

a specialty contract—a contract deliberately drawn up and solemnly sealed and delivered—A. would be bound to carry out his promise, the law presuming that he would not have done so deliberate an act without receiving some proper consideration, and he will not be able to show that the contrary was the case.

(d) Simple contracts are generally good although made by word of mouth only, but to this general rule there are several exceptions. Thus, by the 4th section of the Statute of Frauds five classes of simple contracts are not actionable unless in writing. So under the 17th section of this statute writing is sometimes required; and under Lord Tenterden's Act (9 Geo. 4, c. 14) promises to pay statute-barred debts must be in writing; and, by the custom of merchants, bills of exchange and promissory notes are required to be in writing.

(e) Considerations as to *quality* are divided into *good* and *valuable* considerations. A good consideration is one of natural love and affection, and is insufficient to support a simple contract. A valuable consideration (which will support any contract) consists of money or money's worth, or of some benefit resulting to the party making the promise, or to some third person by the act of the promisee, or of some inconvenience, trouble or loss sustained by the promisee, and it matters not how small or trifling this benefit or loss may be, provided it is not utterly valueless. Thus, if I promise to lend you my horse to ride if you will come to my house and fetch it, the trouble imposed on you in coming for the horse is a sufficient consideration to enable you to compel me to carry out my promise or pay damages for omitting to do so; but if I promise to lend you my horse, and to send it round to your rooms, there being no benefit to me, nor loss or inconvenience to you, my promise would not be binding. If, however, the consideration is so grossly inadequate as to shock the conscience, and so be an index of fraud, equity would set aside the contract.

Although deeds import a consideration, yet unless they are made for some valuable consideration they are liable to be set aside by creditors under 13 Eliz. c. 5, by purchasers under 27 Eliz. c. 4, and by a trustee in bankruptcy under sect. 91 of the Bankruptcy Act, 1869.

[N.B.—Three deeds are void unless made for a consideration—they are: (i) a covenant to stand seised—this requires a consideration of natural love and affection; (ii) a bargain and sale—this re-

quires a pecuniary consideration ; (iii) a covenant in restraint of trade—this requires a reasonable consideration.]

Considerations are also as to *time* (i) *executed* or *past*—thus, if A. promises to pay B. for goods sold and delivered yesterday the consideration for A.'s promise, the sale and delivery of the goods, is *past* or *executed* ; (ii) *executory* or *future*, as if A. promises to pay B. for goods to be delivered to-morrow ; (iii) *concurrent*, where there are mutual promises ; (iv) *continuing*, as in the case of landlord and tenant—so marriage is a continuing consideration.

(f) The parties must be competent to contract ; and if either party is under disability the contract as against that party is void. Thus, *infants* (except for necessities) ; persons *insane*, comprising idiots and lunatics (except reasonable necessary contracts) ; *married women* (except when she acts as the agent of her husband, or is in the position of a *feme sole*, see *post*, p. 168) ; *persons under duress* ; *persons drunk*, *i. e.*, so drunk that they have lost all reason, and therefore cannot have any agreeing mind—are none of them liable on contracts entered into by them.

(g) The parties can contract either by themselves or through their properly authorized agents, and the maxims connected with agents' contracts are : "*Qui facit per alium facit per se*," "*Delegatus non potest delegare*," "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*." (For a translation of these maxims see *post*, Appendix A.)

These being some of the leading general rules relating to contracts, it becomes necessary to consider particularly the different kinds of contracts given in the Commentaries, and the first of these is—

### I. *The Contract of sale.*

The common way in which personal chattels are transferred from one person to another is by sale for a price. A price is essential for all sales, for if one kind of property be *bartered* for another it is an *exchange*, and not a sale.

You must carefully notice the formalities which must be observed in order that a sale may be binding, and bear in mind that the old common law rules still apply as to sales under the value of 10*l.* (*i. e.* to render such sales, if executed, valid, there must be a delivery *or tender* of the goods, or part of them, or payment *or tender* of the price, or part of it) ; but that with regard to sales of goods above the value of

10*l.*, the provisions of the 17th section of the Statute of Frauds apply, and the sale will be good if one of the three alternatives given by that section are complied with (*i.e.* delivery of the goods, or part, and acceptance and receipt; *or* payment of the price, or part, or something given in earnest to bind the bargain; *or* a sufficient memorandum of the contract in writing, duly signed by the party to be charged or his duly authorized agent).

You will observe that the effect of the Statute of Frauds on the old common law rule is, with regard to the sale of goods above the value of 10*l.*, to abolish tender and to add another alternative, that of a memorandum in writing.

Sales of goods may be effected either in or out of *market overt*. This term means markets and fairs held in the country at stated times by virtue of some charter, custom or prescription, and in the *City of London* (but not, it seems, the *West End*) every shop as to goods sold in the tradesman's ordinary trade during the usual business hours on week days.

A man who purchases in *market overt* acquires a title to the goods sold, even though his vendor had no title to them, except in the four following cases, namely:—

- (a) The goods sold belonged to the Crown.
- (b) The goods sold were stolen, and the true owner has prosecuted the thief to conviction.
- (c) The goods sold consisted of a horse, when the purchaser is subject to the provisions of 2 P. & M. c. 7, and 31 Eliz. c. 12, which are set out in the Commentaries, p. 73, and to which I would specially draw your attention.
- (d) The purchaser knew that the goods sold were not the property of the vendor.

Immediately the contract is completed, the property passes to the purchaser, but the vendor has a lien on the goods for their price while they remain in his possession, unless he waives it, as by taking a bill of exchange or promissory note for the price, or by accepting terms of credit. And even after he has parted with the goods by delivering them to a carrier, he can exercise his important right of *stoppage in transitu* if the purchaser becomes insolvent while the goods are in transit—*i.e.* while they are in the hands of the carrier as such, or in any place of deposit connected with their transmission: a right, how-

ever, which is defeated by the purchaser transferring the bill of lading or other document respecting the goods to a *bonâ fide* purchaser for value. The right is sufficiently exercised by notice to a carrier.

The well-known maxim in connection with sales of goods is *caveat emptor*; and as there is on a sale of goods no warranty implied, as a general rule, as to the *quality* of the goods, the purchaser should, to protect himself, get the vendor to enter into an express warranty, on which he will have his remedy if the goods turn out contrary to warranty. With regard to what constitutes a warranty on a sale of goods, it is now established that any affirmation respecting the goods will amount to a warranty if a jury are of opinion that it was so intended. Warranties are sometimes *implied*. Thus, where the goods are bought for a particular purpose, there is an implied warranty that they will answer the purpose; or are of a particular description (*e. g.* provisions—here there is an implied warranty that they are wholesome), and in some other cases.

The second kind of contract given is:—

## II. *Contract of bailment.*

A bailment may be shortly defined as “A delivery of goods for a purpose or a time on contract, express or implied, that the bailee will comply with the object of the trust.”

There are three kinds of simple bailments, or bailments without reward, which, following the phraseology of the Roman law, are (1) *Depositum*; (2) *Mandatum*; (3) *Commodatum*. A simple example will serve to explain these three species of bailment. If A. takes his coat to B.'s office and asks him simply to keep it for him without pay, this is a *depositum* bailment; if A. told B. to repair it without pay, the bailment would be a *mandatum*; and if he told B. that he might wear it without pay, then a *commodatum* bailment would arise. The two bailments for reward are, (1) *Pignori acceptum*, which would occur if A. had taken his coat to a pawnbroker and raised money upon it, and (2) *Locatum*, which includes all bailments for reward (not coming under the head of a *pignori acceptum* bailment); thus if A. had taken his coat to a tailor to repair, or had left it with an innkeeper, who retained it till A. paid his bill, or had delivered it to a carrier to carry, all these bailments by A. would afford instances of a *locatum* bailment.



In connection with bailments for reward, you must notice particularly the nature of the common law liability of innkeepers and carriers for the loss of or injury to goods belonging to their guests or customers, and the way in which their liability has been curtailed by Statute Law.

(See, as to innkeepers, 26 & 27 Vict. c. 41, and 41 & 42 Vict. c. 38; and, as to carriers, 11 Geo. 4 & 1 Will. 4, c. 68; 17 & 18 Vict. c. 31; 17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63, as set out in the Commentaries.)

The third contract considered is—

### III. *Contract of the loan of money.*

In connection with this contract I shall only draw your attention to the rules of law relating to the *interest* reserved on loans. At the present time, by our law, interest at any rate may be reserved on these contracts, but this has not always been so. In Henry VIII.'s reign it was made illegal to reserve more than 10% per cent. per annum on loans; this was reduced in James I.'s reign to 8% per cent., and in Anne's reign it was cut down to 5% per cent. These restrictions, however, did not apply to contracts on which the lender ran great risks of not being repaid his money, or, to use the words of the Commentaries, in those cases where "the money was put into jeopardy," *e. g.* on *bottomry bonds* and *respondentia agreements*, instruments executed by the master of a ship to secure money lent to enable him to carry on his voyage; as the money was only repayable if the ship safely reached its destination, the laws against usury, *i. e.*, forbidding more than a certain rate of interest being reserved, were not allowed to apply; for had they applied, these loans, necessary for commercial purposes as they were, could not have been effected. On the same ground, *viz.*, because the repayment of the principal was put in jeopardy, the usury law had no application to purchases of *life annuities*. These usury laws were found in many cases actually to induce the evil they were passed to prevent, namely, the extortion of the needy and improvident, and, in addition, imposed an impolitic restraint on the price of money, and many relaxations in them were made by statute, but it was not until 1854 that they were entirely repealed, this repeal being effected by 17 & 18 Vict. c. 90; and since this statute, on loans of money being effected, any rate of interest may be reserved by agreement of the parties.

The fourth contract is—

IV. *Contract of partnership.*

Bearing in mind the definition of a partnership given in the Commentaries, partners are of two kinds:—(a) *Private firms*, and (b) *Chartered or joint stock companies*. It is of the former alone that this Chapter treats. A private partnership may be created verbally, (unless it must endure for longer than a year, when writing is necessary under section 4 of the Statute of Frauds,) or by writing, or (as is usually the case) by deed; the dissolution of a such a partnership takes place at the pleasure of either party when no time is fixed, and in other cases from any of the following causes:—

(a) Effluxion of time; (b) mutual consent; (c) decree of the Chancery Division of the High Court granted in all cases in which the Court thinks that the partnership cannot be carried on with advantage to the partners; (d) death or bankruptcy of either partner; (e) marriage of a *feme sole* partner.

Partners are (1) *actual*, (2) *dormant*, (3) *nominal*, terms you must carefully observe the meaning of. Formerly any person who took the slightest share in the profits of a business was liable as a partner; but sharing the profits does not now *per se* constitute a person a partner—see particularly the provision of 28 & 29 Vict. c. 86, set out in the Commentaries, p. 101.

Each partner is the implied agent of the firm, and as such agent has full power to bind the firm by *simple contract with regard to all matters coming within the scope of the partnership business*, and this implied power cannot be taken away or abridged, as far as third persons are concerned, by any agreement between the partners themselves. You must notice the words italicised, for if the contract entered into by one partner is outside the ordinary scope of the partnership business, the firm is not bound; thus, although a member of a mercantile firm has an implied authority to draw, accept, make, and indorse bills of exchange and promissory notes, a member of a legal, mining, or farming firm has no such authority, for the dealing with bills and notes does not form a part of their ordinary every-day business. Whatever the nature of the firm, one partner cannot bind the firm by instrument under seal (except by a release under seal), nor by submitting matters to arbitration; nor will the firm be bound

in any case if there is *mala fides* on the part of the acting partner, of which the other contracting party had notice.

Prior to the Judicature Act, 1873, the Court of Chancery had practically exclusive jurisdiction over partnership matters, and this jurisdiction is now left to the Chancery or Equity Division of the High Court. The equitable jurisdiction consists in granting injunctions to prevent breaches of the partnership articles, ordering a dissolution of the partnership before the regular time, and directing accounts to be taken, and appointing a manager and receiver of the property; and this equitable jurisdiction may be exercised by a County Court when the partnership assets do not exceed 500*l*.

The next contract treated of is:—

#### V. *The contract of guarantee.*

A guarantee is a promise to answer for another person's liabilities. The requisites to a valid guarantee are:—

- (a) It must be in writing and signed by the person giving it, or his agent lawfully authorized (29 Car. 2, c. 3, s. 4).
- (b) There must be a consideration for the guarantee, but this need not now appear on the face of the writing (19 & 20 Vict. c. 97), as was formerly necessary (*Wain v. Warlters*, 5 East, 10).
- (c) The writing must contain a distinct promise, and must show—
- (d) The name of the person to whom the promise is made.

Although writing is generally necessary for a valid guarantee, in order to satisfy the requirements of the 4th section of the Statute of Frauds, it is important for you to bear in mind that this section does not apply if the person whose debt is guaranteed does not remain primarily liable for it. This is clearly established by the decision in the leading case of *Birkmyr v. Darnell*. Thus, if A. goes to a shop with B. and says to the shopman, "Supply B. with goods, and if B. does not pay for them, I will." A.'s promise would not be actionable unless in writing and signed, for here B. remains liable; but had A. said, "Supply B. with goods, and book the amount to me," A. would be liable, although there was no writing, inasmuch as in such a case B. does not become liable, but A. is the actual debtor; in fact, such a contract hardly amounts to a *guarantee* in the strict sense of the word. So again, the statute does not apply unless the

promise is made to the original creditor. Thus, if A. owes B. 100*l.*, and C. promises A. that if he cannot pay he (C.) will, C.'s promise would be actionable, although not in writing, for it was not made to the original creditor, B., and the statute does not apply. This is shown by the case of *Eastwood v. Kenyon*.

A surety's liability may be discharged in the following among other ways :

- (a) By any fraudulent transactions between the principal debtor and creditor.
- (b) By the principal debtor being released or discharged by the creditor ; for, the surety's liability being collateral only, it follows that it must cease with the cessation of the principal's liability.
- (c) By the terms of the original contract being altered by binding agreement between the principal debtor and creditor without the surety's consent, subject however to this, that if time is given to the principal debtor the surety is not discharged, *if the creditor reserves his remedy against the surety*.
- (d) If the guarantee is for a firm, the liability under it ceases with any change in the firm, in the absence of contrary intention (19 & 20 Vict. c. 97).

A surety who pays the debt has the following rights :—

- (a) To recover from the principal all monies, &c., paid on his behalf, and for this purpose to stand in the creditor's place, and use all his remedies, and his name if necessary, on indemnifying him (19 & 20 Vict. c. 97).
- (b) To recover contribution from his co-sureties, a right which rests on the clearest principles of natural justice, and not on contract, express or implied.

The next contract considered is that of a—

#### VI. *Bond.*

A species of contract not now very often entered into, and which may be defined as "an agreement under seal whereby a person obliges himself, his heirs, executors and administrators, to pay a sum of money to another at a day appointed, or to do some act." A condition is generally added that on the payment of a smaller sum of money or the performance of a particular act the bond shall be void, otherwise that it shall remain in full force. Thus, supposing A.

borrow 500*l.* from B., he would perhaps give him a bond for 1,000*l.*, with a condition that the bond should be void on his (A.'s) paying B. 500*l.* and interest on a given day. If A. made this payment in due time the bond was at an end at law and in equity; but if he made default at law B. could formerly have recovered the full amount of the bond (1,000*l.*); but equity, from very early times, looking at the spirit and not at the letter, afforded A. relief on his paying the 500*l.* and interest, and the legislature made the equitable rule a legal rule as well by 4 & 5 Anne, c. 16.

In the same way, if the bond for 1,000*l.* had been given by A. to secure his going to Rome for B., *i.e.* a bond in a penalty to secure the performance of a collateral act, and A. did not go, B. could at law recover the 1,000*l.*: but here again equity interfered, and would not allow B. to recover more of the 1,000*l.* than would compensate him for the loss he sustained by A.'s not going. On this point, however, it is necessary for me to draw your attention to the difference between *liquidated damages* and a *penalty*, for had A. agreed to go to Rome for B., and in default to pay B. 1,000*l.* as *liquidated damages*, the court would not interfere, but would allow the 1,000*l.* to be recovered in the event of A.'s not carrying out his contract, unless it was clear to the court's mind that notwithstanding the words of the contract the 1,000*l.* was really a penalty in disguise inserted only to secure the performance of A.'s act, for in such a case relief would be given; but the mere fact that the sum inserted is a large sum will not induce the court to interfere with the express contract of the parties; something more than *largeness* in the amount must be shown. A bond without a condition is called a *simple* or *single* bond, and is construed against the obligor, while a bond to which a condition is attached is called a *double* or conditional bond, and is construed most strongly against the obligee. The next species of contracts adverted to is of a very important nature, and consists of—

VII. *Bills of exchange* and *promissory notes*, or contracts of a mercantile nature whereby men enter into engagements to pay money.

Bills of exchange (called also *drafts*) are defined as "open letters of request from one man (called the *drafter*) to another (called the *drawee*, and after he accepts, the *acceptor*), desiring him to pay a sum

named at some specified time or on demand to a third person (called the *payee*) on his (the drawer's) account."

If the bill is drawn payable to the payee or his order, or to bearer merely, it is *negotiable*, i. e. the right to sue for the amount due can be transferred to a person who is not a party to a bill. An example may enable you the more readily to understand the nature of these instruments. Supposing A. resides in London and B. in York, and A. has to make a payment in York to C., and it happens that B. owes A. money; in such a case, A., instead of sending C. the money, and compelling B. to pay him his debt, might draw a bill on B. requesting him to pay to C. or to his order (the necessary sum, say,) 50*l.* ten days after sight. The bill is sent to C. and he produces it to B. and asks him if he will meet (or *accept*) the bill. If B. is ready to do so, he gives his acceptance by writing the word *accepted* and his name across the bill (his name alone without the word "*accepted*," being, however, under the Bills of Exchange Act, 1878, sufficient). This done, C. would very probably indorse the bill over to D., and D. might indorse it to E., and so on *ad infinitum*. But I will suppose that D. retains the bill, and when it becomes due, which in this case will be thirteen days after presented for acceptance, it being payable ten days after sight and three days' grace being allowed, (*note here three days of grace run on all bills and notes except those payable at sight, on demand, or on presentation, Bills of Exchange Act, 1871,*) he presents it to B. for payment, and if B. pays it there is of course an end of the matter, and B. obtains a delivery of the bill to him and enters the payment in his books against A. Supposing, however, that B. does not meet the bill, it will be then incumbent on D. to give notice of its dishonour. He would only be obliged to give such notice to C., his own immediate indorser, who in his turn would give notice to A.; but D. would probably give notice to both C. and A. This notice, if the parties resided in the same town or city, would have to be sent off so that it reached its destination on the day following the dishonour; and if the parties did not reside in the same town it would be sufficient to send off the notice by the post of the day following the dishonour; or if the persons to whom notice has to be sent reside abroad it is sufficient to send it off by the first convenient mail or means of communication. Omission to give this notice of dishonour deprives the person who ought to have given it of his remedy against the person to whom the notice

should have been given. I may, however, here call your attention to one case in which notice of dishonour need not be given to the *drawer* of a bill of exchange, and this is when at the time of drawing it he had no funds, and no reasonable grounds for supposing that he would, when the time for paying the bill arrived, have funds in the hands of the drawee—in other words, when the bill is an *accommodation* bill. To return, D., having given due notice of the dishonour, has the right to proceed for payment of the bill against all or any of the other parties to it, *i. e.*, against A., B. or C., unless indeed C. in indorsing had protected himself—as he had a right to—from personal liability by adding the words, *sans recours*, or *without recourse to me*. B., the acceptor, is the person primarily liable for payment of the bill, and A. and C. are mere sureties as far as his liability is concerned; but D. is not bound to sue B., but may proceed against either A. or C. both or either, and joining or not joining, as he sees fit, B. in the action. If C. pay the debt he will have his remedy to recover the amount from A. or B., and if A. pays it he will have his remedy against B.

If the bill is a *foreign* one, that is, if it is drawn and payable abroad, or drawn here and payable abroad, or drawn abroad and payable here, it is not sufficient to give notice of dishonour only, it is necessary to *protest* the bill before a notary public, and so declare an intention to proceed against the other parties.

Sometimes a bill of exchange is accepted *supra protest for honour of the drawer or indorser* by one of their friends, and the person thus accepting becomes liable upon his acceptance when it has been presented and dishonoured, and if a foreign bill protested.

Most of the above remarks apply equally to promissory notes and cheques. A promissory note, however, is a simple promise by one man to another to pay to him or to his order a certain sum of money at a specified time, and there is no third person in the character of acceptor of a promissory note, and consequently the rules regarding acceptances do not apply to those instruments.

A promissory note is considered by the law as a bill of exchange drawn by a man on himself, and accepted at the time of drawing.

Cheques are in effect “bills of exchange drawn on bankers needing no acceptance, payable on demand.”

To prevent frivolous defences on bills of exchange (including cheques) and promissory notes, a statute was passed in 1855, *viz.*, the

18 & 19 Vict. c. 67; but by the Rules of Court, April, 1880, no action can in future be commenced under that act.

Bills of exchange and promissory notes mainly differ from other simple contracts in the following particulars:—

- (a) They must be in writing.
- (b) They are presumed to be given for value.
- (c) They carry interest from the time of their becoming due.
- (d) They cannot be stamped (if *inland* instruments) after execution.
- (e) They have for a long time been assignable; bills of exchange by custom since, at any rate, Henry VII.'s reign; and promissory notes by statute since Anne's reign (3 & 4 Anne, c. 9).
- (f) The assignor can transfer a better title to his assignee than he himself had, provided the transfer takes place before the instrument has fallen due. Thus, supposing A. to have stolen a bill of exchange or promissory note payable to bearer and he assigns it to B. who pays him value for it and has no notice or suspicion that A. obtained it otherwise than *bonâ fide*, B. can compel payment of the bill or note although A. could not have done so. If, however, B. took it from A. after it had fallen due, he would take it subject to all equities attaching to the instrument itself to which it was liable in the hands of A.

The next kind of contract is—

#### VIII. *The Contract of Insurance.*

These contracts generally known as *policies of insurance* are divided into three kinds—(1) marine; (2) fire; (3) life.

(1) *Marine insurance policies*, *i. e.*, contracts to indemnify against loss of and injury to ships and goods at sea, are generally undertaken by a number of persons called *underwriters*, who are liable on the policy in respect of a loss to the amount they write opposite to their respective names. These contracts sometimes extend over a certain specified time, when they are called *time policies*; or they apply to a particular voyage, when they are called *voyage policies*. The policy is said to be a *valued* one when the value of the property insured is ascertained, and *specified* or *open* when no value is mentioned.

These policies are void—

- (a) If the risk, the names of the underwriters, the sums insured, and the person or persons for whose benefit effected, are not specified in the policy.



(b) If made by way of gaming or wagering or without benefit of salvage to the assurer (19 Geo. 2, c. 37).

(c) If a *time* policy and the time exceeds twelve calendar months (35 Geo. 3, c. 63, s. 12).

So the underwriters are freed from responsibility under the following circumstances:—

(d) If the party insuring made any fraudulent representation or concealment to induce the insurance. [Note.—This is a ground for upsetting any insurance policy.]

(e) If at the time of insuring, the ship was not seaworthy, or not properly equipped, or manned.

(f) If during the voyage the vessel *voluntarily* deviates from her course, however slight such deviation may be, and whether or not injury is caused thereby, and whether or not the ship resumes her proper course.

The risks insured against are *the perils of the sea, fire, capture by a public enemy or pirates, jettisons (i. e., throwing away cargo in distress), arrests or embargoes, barratry, or fraudulent conduct on the part of the master or the crew.*

The *loss* for which the insured may recover is either *partial* or *total*. *Total loss*, again, is either *actual*, where the vessel is destroyed, or *constructive*, where it has received so great an injury as to justify the owner in treating it as a total loss. In this case the insured must give the underwriters notice of his having abandoned it, in order that they may have the chance of saving as much as they can.

In case of *partial loss* the owner saves what he can, and goes to the underwriters for the actual loss.

*Salvage* and *general average contribution* are instances of partial loss.

*Salvage* is a sum of money which the underwriters have to pay to the insured to indemnify him for any expenses incurred for the defence, safeguard, or recovery of the property insured. By *general average contribution* you will understand the proportion which the ship, freight, and cargo contribute to a loss by one party for the benefit of all, as jettisons of the tackle or cargo in a storm.

(2) *Fire insurance policies*.—These also are mere contracts of indemnity, and the only risk insured against is fire. No more than the value of the property destroyed can be recovered, and therefore if insured several times, and one of the insurers is made to pay, he may enforce contribution from the other insurers.

(3) *Life insurance policies*.—These, unlike marine and fire insurances, are not mere contracts of indemnity, but contracts to pay on death, or at some other stated time, a certain sum in consideration of certain premiums being paid by the insured as they fall due.

One man may not insure another man's life unless he has some interest in it *at the time of insuring*. Thus, if A. went to an insurance office, and effected an insurance on B.'s life, such insurance would be void, and on B.'s death A. could not recover the sum insured unless he could show that *when the insurance was effected* he had an interest in B.'s life, *e. g.*, that B. owed him money. You will notice the words italicised, for it has been held that the interest need only exist when the policy is entered into, and it is no defence to an action on a life policy to show that the interest did not exist when the person whose life was insured died.

A man has, of course, an insurable interest in his own life, but he has not in the life of his wife, nor in that of his child.

But although a man cannot effect a valid policy on his wife's life, a wife can insure either her own life, or the life of her husband, for her benefit and the benefit of her children under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).

Life policies were made assignable in 1867 (30 & 31 Vict. c. 144), and marine policies in 1868 (31 & 32 Vict. c. 68), but fire policies are still incapable of assignment without the consent of the insurer.

The last contract noticed is that of—

#### IX. *Charter-party.*

Charter-parties are instruments of a mercantile character, sometimes sealed and sometimes not, by which a ship is hired for a particular voyage or time. The charterer, or person hiring the vessel, undertakes—

- (a) To load and unload within a certain number of days (called *lay*, or *running* days).
- (b) To pay so much a day for every day he detains the vessel beyond the running days. (The sum to be paid for this delay, as well as the delay itself, is called *demurrage*.)
- (c) To pay a certain sum for the carriage of the goods, either per ton or per month. (The sum so payable is called *freight*, a term sometimes also used to denote the cargo itself.)

The shipowner, on his part, undertakes—

- (a) To furnish a seaworthy and properly manned and equipped vessel.
- (b) To deliver the cargo safe, unless prevented by act of God or the Queen's enemies (*vis major*).

This delivery, however, cannot be compelled until the freight is paid, unless there is a contrary agreement, or the ship is actually demised, for then (in the latter case) the ship master is in possession of the vessel as servant for the charterer.

#### POINTS TO NOTE.

- I. What the differences between—(a) a contract and a promise, (b) a parol contract and a specialty contract, respectively are.
- II. With what object the Statute of Frauds was passed.
- III. What the contracts are which are required by the 4th section of the Statute of Frauds to be in writing, and what the result is if any of such contracts are entered into but are not reduced into writing.  
(N.B.—The provisions of this section should be known almost by heart.)
- IV. Whether or not the agent's authority to sign a contract under this section need be a written one.
- V. What simple contracts, independently of the Statute of Frauds, are required to be in writing. (See 9 Geo. 4, c. 14, ss. 1, 6.)
- VI. Give an instance of—(a) an implied contract; (b) an executed contract; (c) an executory contract.
- VII. What the memorandum required by the 4th section of the Statute of Frauds to be in writing must show.
- VIII. How considerations are divided—1st, as to *quality*; 2nd, as to *time*.
- IX. Distinguish carefully between a *good* and *valuable* consideration.
- X. How *valuable* considerations are divided by the civilians.
- XI. What an explanation of the following maxim in connection with simple contracts is, *ex nudo pacto non oritur actio*, and why the maxim has no application to contracts under seal.

XII. Under what circumstances a promise made for a past or executed consideration is binding.

[N.B.—In order that such promises may be binding, the consideration must have been moved at the previous request of the party promising; thus, if A. yesterday delivered goods to B., and to-day B. promises to pay for them, the consideration for B.'s promise (the delivery of the goods) being past or executed, B. will not be bound unless A. can prove that the goods were delivered at B.'s previous request. This request is in some cases implied; thus it would be in the case supposed if B. kept the goods.]

XIII. Whether the following *promises*, contained in instruments under seal, are good or bad, and why—

- (a) A promise by A. in consideration of 100*l.* paid him by B. that he (A.) will never marry.
- (b) A promise by A. to pay B. 100*l.* if he (B.) will not prosecute C. for perjury.
- (c) A promise by A. that out of natural love and affection he will convey a piece of land to C.

XIV. Whether or not C. can take advantage of the following contract:—A. and B., without the privity of C., agree for a proper consideration that B. shall pay C. 100*l.*

XV. What exceptions there are to the following general rules:—(a) That all simple contracts require a sixpenny stamp; (b) that all such contracts can be stamped within fourteen days of their date.

XVI. “Infants are competent to confirm in writing after they attain majority contracts made by them before majority.” Whether or not that is so at the present time. (See Infants’ Relief Act, 1874.)

XVII. Whether if A., for a proper consideration, agrees to do an act for B. which, at the time of the promise being made, is perfectly legal, but which by statute is subsequently and before the act is done made illegal, A. will be excused performance of it; and whether he would have been excused if the thing agreed to be done had become *impossible* of performance.

- XVIII. Give an example and discuss the nature of a contract on a condition precedent.
- XIX. How an agency may be constituted and determined.
- XX. In what cases an agent must be appointed—(a) by writing; (b) by deed.
- XXI. In what case or cases an agent's authority cannot be revoked by the principal without the agent's consent.
- XXII. On what contracts entered into by his agent a principal is responsible, and how in this respect the contracts of a *general* differ from the contracts of a *special* agent.
- XXIII. In what cases an agent becomes personally responsible on contracts entered into by him.
- XXIV. In connection with the sale of goods at common law explain the meaning of the terms (a) *earnest*, (b) *handsale*.
- XXV. A. agrees to purchase on credit from B. some goods part of a bulk. Before B. has taken delivery, and before they are separated from the bulk, the goods are destroyed by fire. On whom the loss will fall, A. or B., and whether there would be any difference if the goods were destroyed after being separated from the bulk.
- XXVI. What additional right has been conferred on purchasers of goods by 19 & 20 Vict. c. 97, s. 2.
- XXVII. What the provisions of the 17th section of the Statute of Frauds, relating to the sale of goods, are, and how these provisions have been extended by 9 Geo. 4, c. 14, s. 7.
- XXVIII. What rights, as against pawnbrokers, were conferred on persons whose goods have been stolen and pawned, by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93, s. 36).
- XXIX. What the provisions of 30 & 31 Vict. c. 29, relating to contracts for the sale of shares in joint-stock banking companies, are.
- XXX. Explain fully the maxim "*Caveat emptor*," showing whether this maxim applied with as full force under the civil law as under our own law.
- XXXI. What the difference between factors and brokers is.

- XXXII. What the nature of the liability of a factor *del credere* is.
- XXXIII. What alteration in the law relating to sales and pledges by factors is effected by the Factors Acts. (See 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.)
- XXXIV. What a definition of the following terms is: (a) bailment; (b) agistment.
- XXXV. In connection with bailments and the bailee's responsibility for the goods bailed, what is meant by *ordinary*, *slight*, and *gross negligence*.
- XXXVI. What a lien is, and how *general* liens differ from *particular* or *special* liens.
- XXXVII. Whether or not the subject-matter of a lien can be sold, and how far the point is affected by the Innkeepers Act, 1878.
- XXXVIII. The goods of a guest, of the value of 100*l.*, while staying at an inn are lost. Whether or not the guest could under any and what circumstances recover the full value of the goods; how far the question is affected by the Innkeepers Act, 1863.
- XXXIX. Under what circumstances an innkeeper is justified in refusing to receive a guest into his house.
- XL. Discuss the nature of an innkeeper's lien, having regard to the Act of 1878, above referred to.
- XLI. What the nature of the liability of a carrier of goods at common law was for the loss of or injury to those goods, and how far the nature of his liability, when he carries by land, has been altered by the Carriers Act, 1830, and the Railway and Canal Traffic Act, 1854.
- XLII. To what extent a common carrier of goods by sea is liable, and how far the question is affected by statutory enactments. (See 17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63.)
- XLIII. In connection with contracts for the loan of money, explain the following terms: (a) *usury*, (b) *interest*, (c) *bottomry*, (d) *respondentia*, (e) *fœnus nauticum*, (f) *usura maritima*.
- XLIV. Distinguish a contract for the loan of money from a bailment.
- XLV. To what two classes of transactions the usury laws had no application.

XLVI. Under what circumstances the purchase of a life annuity is usually made, and why these purchases were not subject to the usury laws.

XLVII. What provisions for the protection of purchasers and creditors are contained in 18 & 19 Vict. c. 15, ss. 12, 14, respecting life annuities.

XLVIII. In what cases interest can be claimed without any express agreement to pay it.

[N.B.—These cases may be stated to be—

- (a) On balances due on accounts stated.
- (b) On overdue money bonds, bills of exchange, and promissory notes.
- (c) On judgments.
- (d) On all contracts which carry interest by virtue of some trade, usage, or custom.
- (e) On all contracts in which in previous dealings between the parties interest has been paid.]

XLIX. In what cases a jury *may* allow interest under 3 & 4 Will. 4, c. 42.

[N.B.—Under this statute you will observe the allowance of interest is in the jury's discretion; but in the cases set out in the note to the last head the jury *must* allow interest.]

L. On what principle it is that a firm is responsible for the acts of each of its members.

LI. A. and B. are in partnership, one of the terms between them being that A. is to receive half the profits, but that B. alone is to be liable for the debts contracted. Whether or not such an agreement would prevent C., a creditor of the firm, suing A.

LII. How *dormant* and *ostensible* partners differ, and whether or not, and if so, on what principle, they are both or either responsible for the debts of the firm.

LIII. In what cases a person who receives a share in the profits is not now liable as a partner. (See 28 & 29 Vict. c. 86.)

LIV. What steps a retiring partner must take to avoid further responsibility in connection with the firm, and whether the rules on this point apply equally to *actual*, *dormant*, and *ostensible* partners.

- LIV. Whether or not a surety can take any and what steps to compel the principal to pay off the debt when it becomes due.
- LVI. Supposing the condition subject to which a bond is made is impossible, uncertain, or illegal, what the result is.
- LVII. Whether the illegality of a condition subject to which a bond is made could be alleged by the obligor of the bond, or whether the doctrine of *estoppel* would prevent such allegation.
- LVIII. Whether a bond subject to several conditions, some legal and some illegal, will be good or bad, wholly or in part.
- LIX. What the result is when the condition of a bond after its execution becomes illegal or impossible through the act of God or the obligee himself.
- LX. In an action on a bond in a penalty, for what sum judgment may be entered up and execution issued at the present time.
- LXI. What the distinction is between *penalties* and *liquidated damages*.
- LXII. In connection with negotiable instruments, what the respective meanings of the following terms are :—
- (a) Bill of exchange, distinguishing *inland* from *foreign* bills ; (b) promissory note ; (c) cheque ; (d) indorsement in blank and in full ; (e) acceptance ; (f) general and special acceptance ; (g) acceptance *supra* protest ; (h) accommodation bill ; (i) protest ; (j) days of *grace*.
- LXIII. What instruments are *negotiable*.
- LXIV. In what cases a bill or note can be assigned by mere delivery without indorsement.
- LXV. When a bill or note is said to arrive at *maturity*.
- LXVI. When it is necessary to present a bill of exchange for *acceptance*, and why desirable to so present every bill.
- LXVII. What the space of time allowed the drawee to decide whether he will accept the bill or refuse to accept it is.
- LXVIII. What steps, and within what time, must be taken when the drawee either fails to accept or to pay the bill.



- LXIX.** When notice of dishonour to the drawer is not necessary.
- LXX.** What the provisions of 6 & 7 Will. 4, c. 58, and 34 Vict. c. 17, relating to bills of exchange accepted for the honour of the drawer or indorser, are.
- LXXI.** What the provisions of 19 & 20 Vict. c. 97, and of 41 & 42 Vict. c. 18, relating to the acceptance of a bill of exchange, are.
- LXXII.** What the provisions of 39 & 40 Vict. c. 81, relating to the law of crossed cheques, are.
- LXXIII.** What the provisions of 34 & 35 Vict. c. 74, relating to days of grace, are. Whether or not days of grace attach to cheques and notes as well as to bills.
- LXXIV.** What the lowest amount is for which bills of exchange and promissory notes drawn payable to order and to bearer respectively may be made, and whether cheques are subject to the same rule. (See 48 Geo. 3, c. 88, s. 2; 7 Geo. 4, c. 6, and 23 & 24 Vict. c. 111, s. 19.)
- LXXV.** What the advantages derived from policies of insurance being effected are, and what the usual kinds are.
- LXXVI.** By whom marine insurances are supposed to have been introduced into this country, and on what facts this supposition is based, and in whose reign a particular court for trial of questions relating to those insurances was established, and whether this court still exists or not.
- LXXVII.** What, in connection with marine insurances, the following terms mean:—(a) Barratry; (b) Jettison; (c) Re-assurance; (d) Double insurance.
- LXXVIII.** Whether or not a jury in actions on marine policies can give damages over and above the amount secured by the policy (3 & 4 Will. 4, c. 42, s. 29).
- LXXIX.** What fire and life policies respectively are, and how they differ.
- LXXX.** Under what circumstances A. can insure B.'s life, and on B.'s death recover the money secured by the policy.

- LXXXI.** What the decision in *Dalby v. India and London Life Assurance Company* was, and what alteration it made in the law of life policies as established by the case of *Godsall v. Boldero*.
- LXXXII.** Under what circumstances a premium paid on an assurance policy can and cannot be recovered back. Explain, in reference to this, the maxim, "*In pari delicto potior est conditio possidentis*."
- LXXXIII.** What a *general ship* is, and what freight *pro ratâ itineris* is, and whether this freight is payable by express or implied contract.
- LXXXIV.** A carrier having injured the goods carried by him, an action for compensation for such injury is brought,—whether or not it would be correct to define the action as an action of *debt*.
- LXXXV.** What a *debt* is, and what the various kinds are.
- LXXXVI.** What debts of record are, and what the most common examples of these debts met with at the present day are.
- LXXXVII.** Whether a debt can be properly considered as a species of a contract; and if so, how a debt may arise independently of contract.

#### TEST PAPER TO WORK OUT.

1. What is comprised in the term "chattels personal"?
2. For what period can personal property be tied up? How long can the income of such property be accumulated?
3. What is a bill of lading, and how far has it been affected by statute law?
4. Mention some cases in which an agent's authority is required to be by deed?
5. Distinguish (a) a sale and an exchange; (b) a factor and a broker; (c) a factor and a factor *del credere*.
6. What do you understand by "market overt"? What is the effect of sales made and perfected therein?
7. What is the extent of the common law liability of a carrier of goods, and how has this liability been narrowed by statute?
8. Define (a) a guarantee; (b) a bond; (c) a promissory note.

## Seventh Week's Work.

This includes—

### BOOK II., PART II.

CHAPTER VI.—*Of Title by Bankruptcy.*

„ VII.—*Of Title by Will and by Administration.*

CONCLUSION.—*Of some mixed or irregular Subjects of Property.*

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### BOOK III.—OF RIGHTS IN PRIVATE RELATIONS.

CHAPTER I.—*Of Master and Servant.*

„ II.—*Of Husband and Wife.*

„ III.—*Of Parent and Child.*

„ IV.—*Of Guardian and Ward.*

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### Chapter VI.—Of Title by Bankruptcy.

#### REMARKS.

This Chapter treats of a branch of the law which is likely to undergo some considerable change before very long, and it is not probable that the examiners will ask questions upon it, or if they do, the questions asked will certainly be of an elementary nature. Bearing in mind, however, that the law of bankruptcy is one of the subjects for the Final Examination, and that even if there is some new Bankruptcy Act passed before your Final Examination arrives, you will find a knowledge of the law as it now stands very useful in understanding any new law which may be made on the subject, I propose to give you a short epitome of this Chapter, which I strongly recommend you to get up.

Since the reign of Henry VIII., persons unable to pay their debts have been liable to the bankrupt laws, *i. e.*, to have their property, real and personal, taken from them and distributed among their creditors whose interests alone were looked to by the early statutes on the subject; but in Anne's reign the interests of the debtor himself were taken into consideration by the legislature, and it was enacted that a bankrupt having given up all his property, and conformed to the bankruptcy laws, should be free from liability for debts theretofore incurred. The old statutes relating to bankruptcy, however, only applied to traders, and non-traders were not liable to the bankruptcy laws until 1861, although, under various Acts passed in the beginning of the present reign, all insolvent debtors were enabled

to get freedom from their debts by giving up their property for distribution among the creditors—the proceedings being taken in a court established for the purpose. The Bankruptcy Act of 1861 made non-traders liable to the laws of bankruptcy as well as traders, —a provision which is continued by the Bankruptcy Act, 1869, the 32 & 33 Vict. c. 71, the principal provisions of which are treated of in this Chapter.

The threefold object of the bankruptcy laws as established by the Act of 1869 may be said to be :

- (1) To provide a means whereby a debtor can obtain a discharge from his debts, and so start a "clear man again."
- (2) To provide a means whereby creditors can obtain an equal division of their common debtor's property in a speedy and cheap manner.
- (3) To provide a means whereby a fraudulent debtor may be punished by imprisonment.

Proceedings to make a man bankrupt may be taken either in the London Court of Bankruptcy, when the debtor lives or carries on a business in the district of that court or when he resides abroad, or in the local Bankruptcy Court, *i. e.* the County Court having bankruptcy jurisdiction in the district in which the debtor lives or carries on business.

Following the heads in the Commentaries, the first question is—

#### I. *Who may be made a bankrupt?*

Shortly it may be stated that "all *debtors*, whether traders or not, are now liable to be made bankrupt, including peers of the realm, members of the House of Commons, clergymen, her Majesty's justices of the peace, aliens, and members of ordinary partnerships. The following persons, however, cannot be made bankrupt, namely—

- (a) Partnerships, associations, and companies registered under the Companies Act, 1862. (If these partnerships, &c. are unable to meet their engagements, they are wound up in the Chancery Division, and not in the Bankruptcy Court.)
- (b) Infants, except possibly with regard to contract for necessaries.
- (c) Married women, excepting in some cases.

Before passing to the second head, I must draw your attention to the necessity of carefully noticing what persons are deemed *traders*,

a point it is very essential for you to understand, for although all persons, whether traders or not, are liable to the present bankruptcy laws, yet, as there are many provisions of the Bankruptcy Act which only apply to *traders*, the necessity of knowing who is a trader becomes obvious.

The question secondly considered is—

II. *Under what circumstances and in what manner a debtor is adjudicated a bankrupt?*

*As to the circumstances—*

1st. He must have committed an act of bankruptcy.

2nd. He must be indebted to the extent of 50*l.* or more.

With regard to the act of bankruptcy, you must carefully get up the various acts of bankruptcy given in the Commentaries, and notice particularly which of them apply to traders only, and bear in mind that proceedings to make a man a bankrupt on an act of bankruptcy must be taken within six months after the act committed, and that those acts which constitute acts of bankruptcy, if fraudulently done, are deemed fraudulent if by them the creditors are defeated or delayed.

The 50*l.* indebtedness referred to need not be owing all to one creditor, for several creditors, the aggregate amount of whose debts is 50*l.* or upwards, can club together to take proceedings to make the debtor bankrupt. The debt or debts must be a liquidated sum or sums due at law or in equity, and existing at the time of the act of bankruptcy was committed.

*As to the manner in which a debtor is made a bankrupt.*

This is by a petition presented to the proper court, verified by affidavit, praying adjudication, and alleging the act of bankruptcy. A copy is served on the debtor seven days before it comes on for hearing. The hearing comes on in due course; and on the debt, the trading (if necessary), and the act of bankruptcy being proved, the debtor is adjudicated a bankrupt. A copy of the order of adjudication is then published in the London Gazette and (if necessary) in the local papers, and until that publication the bankruptcy does not take effect. It is desirable here to draw your attention to what is called the *doctrine of relation*: this means that the bankruptcy of a debtor does not date from the order of adjudication being made, but has relation back to

the date of the act of bankruptcy; or, if there have been several acts of bankruptcy committed, then to the earliest act committed within twelve months of the order of adjudication, if at that time the debtor owed a debt or debts sufficient to support a bankruptcy petition, and such debt or debts is or are owing at the time of adjudication. Between the time of this act of bankruptcy, to which the order of adjudication relates back, being committed and the date of the adjudication order, the debtor is in a position of a bankrupt, and any contract or disposition made by him during that time may be set aside by his trustee. Certain transactions during this time are, however, protected. (See particularly p. 168 of the Commentaries.)

After the presentation of a petition in bankruptcy, and before adjudication, the Court of Bankruptcy may stay proceedings which are pending against the debtor for a debt provable under the bankruptcy, and may also appoint a receiver or manager of the property or business of the debtor. This right to stay proceedings is not taken away by sect. 24 of the Judicature Act, 1873, which provides that no proceeding in the High Court shall be stayed by prohibition or injunction.

Thirdly is considered—

### III. *What proceedings take place after adjudication? i. e., between the date of the adjudication and the order of discharge.*

Immediately upon adjudication the bankrupt's property becomes divisible amongst all the creditors who prove, and no proceedings for debts provable under the bankruptcy can be taken except under the provisions of the Bankruptcy Act.

The first step taken is the summoning, by means of a notice inserted in the London Gazette and one local paper (ten days beforehand), a general meeting of the creditors.

At this meeting the creditors proceed to do the following things:—

- (a) Prove their debts.
- (b) Appoint a trustee (who may be a creditor or not).
- (c) Resolve what security the trustee is to give, and to whom it is to be given.
- (d) Resolve on the appointment of a *committee of inspection* (consisting of not more than five creditors) to supervise the trustee in his management of the bankrupt's property.
- (e) Resolve how the trustee is to administer the property.

- (f) Appoint a meeting for the *public examination of the bankrupt* not later than forty days from the first meeting.

The appointment of the trustee may be left to the committee of inspection. Immediately on his appointment the property of the bankrupt vests in the trustee. The object of the trustee's appointment is that he may get in all the property of the bankrupt, and distribute it among the creditors by means of dividends.

To carry out this object properly, the following are some of his most important duties:—

- (a) To follow the directions given by the creditors' resolutions or by the committee of inspection (the former's directions over-riding the latter's).
- (b) To call meetings of the committee of inspection, this must be done at least once in every three months; and of the creditors when necessary.
- (c) To declare dividends, with the sanction of the committee of inspection.
- (d) To keep proper accounts, have them audited by the committee of inspection, and transmitted to the comptroller.
- (e) To keep two books, the *Record* and the *Estate* book.
- (f) To pay monies received by him into the bank appointed by the creditors, or, if no bank appointed, then into the Bank of England.
- (g) To examine every proof and ground of debt, and in writing reject, admit, or require further proof in respect of it.

Subject to these, and some other duties, the trustee may use his discretion in the management and distribution of the estate, but any one aggrieved by his act may apply to the court for redress, and in order to enable the trustee to carry out to the full the object of his appointment, extensive powers are given to him by the act. These powers you must carefully get up, and notice particularly which of the powers he may exercise of his own authority, and which he can only exercise with the sanction of the committee of inspection; you will find them fully set out in a foot-note to the Commentaries, p. 156.

The trustee having realized all the property readily realizable and distributed it among the creditors applies to the court for his release, which may be opposed by the creditors, but if granted it operates to discharge him for all acts done during the bankruptcy, the court having the right to revoke the release if obtained by fraud.

*A few words with regard to the bankrupt.*

The bankrupt must aid the trustee in administering the property, and for this purpose attend meetings, execute deeds, disclose his property, undergo his public examination, &c.

When the bankruptcy is closed, or earlier, with the consent of his creditors, the bankrupt can apply for his order of discharge, which will be granted him if he can prove that one of the following conditions has been fulfilled:—

- (1) That 10s. in the £ or more has been paid.
- (2) That 10s. in the £ might have been paid but for the fraud or negligence of the trustee.
- (3) That the creditors have passed a special resolution to the effect that the bankruptcy or failure to pay 10s. in the £ arose from circumstances for which the bankrupt could not justly be held responsible.

Notwithstanding the fulfilment of one of these conditions the court can withhold the discharge for a time or altogether, under the following circumstances:—

- (a) When the creditors by special resolution represent that the bankrupt has failed to give up his property to the trustee.
- (b) When a prosecution has been commenced against him in respect of an offence against the Debtors Act, 1869.

(You must notice particularly the cases under this Debtors Act in which a bankrupt becomes guilty of a misdemeanor and of a felony respectively, and to what punishment he becomes subject; see pp. 159, 160 in the Commentaries.)

A bankrupt having obtained his order of discharge becomes “a clear man again,” free from all debts provable under the bankruptcy, except:—

- (a) Debts or liabilities incurred by fraud or breach of trust.
- (b) Debts or liabilities of which forbearance has been obtained by fraud.
- (c) Debts due to the crown.
- (d) Debts incurred by any offence against the public revenue statutes, or on a bail bond entered into for the appearance of any person prosecuted for any such offence.

In cases “c” and “d,” however, the Commissioners of the Treasury may certify their consent to the bankrupt’s discharge operating to release these claims.



If a bankrupt cannot obtain his order of discharge after the bankruptcy is closed, the following results ensue :—

- (a) No debt provable under the bankruptcy can be enforced for three years; and if during this time he makes up with the dividends already paid a payment of 10s. in the £ he can get his discharge.
- (b) After such three years if a discharge has not been obtained any balance of a debt proved has the effect of a judgment debt, and, subject to the right of subsequent creditors, may be enforced against the bankrupt's property by leave of and in the manner directed by the court in which the order of adjudication was made, or by the court having bankruptcy jurisdiction in the district in which the property is situate.

The fourth question considered is—

#### IV. *The effect of the bankruptcy on the property of the bankrupt?*

After the order of adjudication, and until appointment of a trustee, the property of the bankrupt vests in the registrar of the court making the order, to whom it again passes if at any time there is no trustee. Immediately on the appointment of a trustee the property without any conveyance passes from the registrar to the trustee.

The term "property" is not confined to that which was in the bankrupt's possession at the time of the order of adjudication, but extends to that which devolves upon him during the continuance of the bankruptcy, and may be said to include :—

- (a) All real property, whether of freehold, copyhold or customary freehold tenure.
- (b) All personal property, whether consisting of chattels real or chattels personal, and including stocks and shares in companies and shares in ships.
- (c) All property real or personal over which the bankrupt has a power of appointment, except the power of appointing to vacant ecclesiastical benefices.
- (d) *If the bankrupt is a trader*, all the goods and chattels of a stranger which at the commencement of the bankruptcy were in the bankrupt's possession, with the consent of the true owner, and of which the bankrupt was the reputed owner, or has taken upon himself the sale and disposition as owner. This, however, does not include
  - (i) choses in action which have been assigned, unless they are trade

debts; (ii) goods and chattels comprised in a duly-registered bill of sale (41 & 42 Vict. c. 31, s. 20).

(e) *If the bankrupt is a trader*, any property belonging to him (not including however that coming to him in the right of his wife) which he has *voluntarily* conveyed to another person within two years of his bankruptcy, or within ten years in case the person claiming under the conveyance cannot show that at the time of its execution the bankrupt was solvent.

(f) Any property obtained by a creditor from the bankrupt within three months of his bankruptcy under circumstances making the obtaining of it a *fraudulent* preference within the meaning of section 92.

Although the property above mentioned passes to the trustee by virtue of his office he is not obliged to retain it all, for he may disclaim the following property:—

(a) Land subject to onerous covenants, but leaseholds can only be disclaimed by leave of the court.

(b) Unmarketable shares in companies.

(c) Unprofitable contracts.

(d) Any other property not saleable or readily saleable.

The disclaimer must be made within twenty-eight days after notice requiring him to disclaim has been given to the trustee, and any person injured by such disclaimer can prove as a creditor for his injury.

The following property does not pass to the trustee:—

(a) Property acquired by the bankrupt by his personal labour after the bankruptcy.

(b) Claims for personal wrongs.

(c) Property held by the bankrupt as trustee for others.

(d) Tools of the bankrupt's trade, and wearing apparel and bedding of himself, his wife, and children, not exceeding altogether the value of 20*l*.

(e) Offices which are of such a nature that they cannot be sold, *e. g.* the benefice of a bankrupt clergyman, so much of the profits of which, however, can be sequestered as the bishop, on the trustee's application, may direct.

(f) The pay of military and other persons employed by the crown. So much, however, of the pay, half-pay, salary, emolument, or pension of such persons may be applied in payment of the bankrupt's

debts, as the chief officer of the department to which the bankrupt belongs, or has belonged, may direct.

(g) Goods bought on credit by the bankrupt with respect to which the vendor has exercised his right of stoppage *in transitu* or *ante transitum*.

With regard to the payment of the bankrupt's debts, the general rule is, that they are to be paid *pari passu* (equally) among all the creditors; thus a judgment creditor has no priority over a creditor by mere simple contract, notwithstanding the trouble and precaution taken by him in obtaining judgment. To this general rule, however, the following exceptions exist:—

(i) A creditor holding security for his debt (*i. e.* a secured creditor) is entitled to the benefit of his security. Such a creditor must, however, adopt one of three courses:—(1) rest on his security; (2) give it up, and prove for the whole debt; (3) value it, and prove for any balance. In the last case the trustee may redeem it at its assessed value; and if he does not, and the creditor sells the subject of the security and realizes more than the value he put upon it, the surplus belongs to the trustee; while if it realizes less than the assessed value the creditor has no remedy for the balance.

(ii)—(a) One year's parochial and other rates due at the adjudication, and assessed, land, and property (or income) taxes assessed to the 5th of April next before the adjudication, and not exceeding one year's assessment.

(b) Wages or salary of a clerk or servant employed at the adjudication, not exceeding four months nor 50%, and wages of labourers or workmen so employed not exceeding two months.

These must be paid in full before all other debts.

(iii) A landlord, if he has put a distress in before the bankruptcy, may distrain for all arrears of rent (not exceeding six years); but after bankruptcy he can only put in a distress for one year's arrears, and for any balance he must prove as an ordinary creditor.

Rent, for the purpose of proving, is deemed to accrue proportionally from the last day of payment up to the adjudication.

(iv) A creditor who owes a debt to the bankrupt is entitled to set it off against the debt owing to him, and thus, as far as the set-off extends, obtain payment in full of his debt, and he can then prove for the balance due to him (if any).

(v) An apprentice or artied clerk of the bankrupt can apply to

the trustee for a return of a proportion of the premium paid by him, an application the trustee is authorized to comply with, or he may transfer the applicant to some new master.

The trustee must require proper proof of all debts before paying them. This proof is afforded by affidavit in the form provided.

*What debts can be proved.*

With the exception of demands in the nature of unliquidated damages arising from some tort unconnected with contract (for these cannot be proved for), *all debts and liabilities present and future, certain and contingent, to which the bankrupt is subject at the date of adjudication, or to which he may become liable during the bankruptcy in respect of any obligation incurred before adjudication, may be proved for.* This includes—

- (a) All debts of a certain nature.
- (b) Debts of an uncertain nature; the value of these is estimated by the trustee, and if the creditor is dissatisfied with his valuation, the amount is assessed by the court itself, if all parties consent; otherwise by a jury before the court.
- (c) Liabilities on contracts made by the bankrupt jointly with others.
- (d) Debts not due at the time of bankruptcy; but in this case a rebate of interest must be deducted at the rate of 5% from the declaration of the dividend to the time when the debt falls due.

Interest may be paid by the trustee in those cases in which a jury may allow interest. (See 3 & 4 Will. 4, c. 42, s. 28, set out in p. 96 of the Commentaries.)

A knowledge of the foregoing will be sufficient to give you some fair general knowledge of the law of bankruptcy. It remains for me to add a few words concerning the two other modes by which a man in difficulties can, under the bankruptcy law, free himself from his liabilities and start a fresh man, and these modes are—

I. *Liquidation by arrangement.*

II. *Liquidation by way of composition, or, Composition with creditors, as it is commonly called.*

Taking *Liquidation by arrangement* first:—

The creditors of a debtor unable to pay his debts may, by *special resolution*, determine that the debtor's estate be wound up by liquida-

tion by arrangement, and may appoint a trustee, with or without a committee of inspection. The debtor must be present at the meeting, and furnish a statement of his debts and assets, and the names and addresses of his creditors. The special resolution and statement, and the names of the trustee and committee of inspection (if any) must be presented to and registered by the registrar, and the registration by him is conclusive evidence of the validity of the proceedings in the absence of fraud. The liquidation is deemed to commence from the trustee's appointment.

The provisions in the Act relating to bankruptcies apply generally to liquidations by arrangement, particularly as to the trustee's powers and duties, the vesting of the debtor's property in and the division by him, and the transactions which are void against him. The provisions of the Act, however, relating to the *close* of the bankruptcy, the trustee's *release*, and the *audit* of his accounts, have no application to liquidation, these matters being regulated by the creditors in general meeting by special resolution.

The discharge of the debtor being granted by the creditors, is reported by the trustee to the registrar, and the registrar's certificate of the discharge is as effectual as the like certificate in bankruptcy.

A special resolution is one passed by a majority in number and three-fourths in value of the creditors present personally or by proxy at the meeting, and voting on such resolution.

(NOTE HERE that although in bankruptcy the creditors whose debts do not exceed 10% are reckoned both in value and number for the purposes of a special resolution; yet, in liquidation, such creditors are reckoned in *value* only.)

Secondly, as to—

## II. *Composition with Creditors.*

The creditors of a debtor unable to pay his debts may, by *extraordinary resolution*, accept of a *composition* in satisfaction of their debts. This resolution is come to at a general meeting called together by the debtor, at which he must attend and produce a statement of his affairs, as in liquidation by arrangement. The resolution and statement must be registered with the registrar. The composition binds those creditors, and those only, whose names and addresses and the amount of whose debts are shown in the debtor's statement. The composition provisions not being complied with, the creditors

may either apply to have the composition enforced by the court by motion in a summary way or they can pursue their legal remedies as if the composition had not been entered into.

An *extraordinary resolution* is one passed by a majority in number and three-fourths in value of the creditors at a general meeting, and confirmed by a majority in number and value of the creditors assembled at a subsequent meeting held not less than seven nor more than fourteen days from the first meeting. It is, in fact, a special resolution confirmed; and the rules as to reckoning the majorities are the same as those just mentioned in respect of special resolutions in liquidation.

Thirdly—

III. *General provisions relating as well to liquidation by arrangement as to composition with creditors.*

The proceedings in both cases are commenced by a petition presented by the debtor to the Court of Bankruptcy, stating the estimated amount of the debts, and verified by affidavit. The first general meeting must be summoned within one calendar month of the presentation of the petition. Notices summoning the creditors must be taken to the registrar with a list of creditors, and a request to send them out. The Registrar will seal each notice, check it with the list, and post it fourteen days before the meeting; seven days' notice must be advertised in the London Gazette. After the petition is presented the court may stay any proceedings against the debtor or his estate, appoint a receiver or manager of the estate, and direct immediate possession to be taken of the property.

The judge may adjudge the debtor a bankrupt when the liquidation by arrangement or by composition cannot, in consequence of legal difficulties or some other cause, be properly carried out.

This brings you to the end of the Chapter on Bankruptcy—the laws with regard to which will probably before long undergo important alterations—and before passing on I must draw your attention to the necessity of reading carefully the foot-notes to the Commentaries throughout the four volumes. Very important matter is from time to time contained in a foot-note only; and especially is this the case in the Chapter on Bankruptcy. I think it desirable to mention this, as I so often find that my own pupils almost invariably think

they may skip over remarks in the foot-notes—a mistake which any one will discover who peruses some of the questions lately asked at the Incorporated Law Society Examinations, and taken directly from these notes.

### Chapter VII.—Of Title by Will and by Administration.

#### REMARKS.

In the first place this Chapter considers—

#### I. *What is the history relating to the acquisition of personal property by will and by administration?*

A careful perusal of what appears on this head in the Commentaries will show you—

(1) That the right to dispose by will of personal property has always been allowed by our law, although formerly a man could dispose of a third of his property only if he had a wife and children, to whom the other two-thirds went, or of a moiety if he had a wife only or children only, the other moiety going to the wife or children, as the case might be.

(2) That the portion of the property to which the wife and children were entitled was known as their *pars rationabilis* or reasonable part.

(3) That the necessity for leaving this *pars rationabilis* imperceptibly ceased in the country generally, but that it continued in the province of York, the principality of Wales, and the City of London, until its abolition at a comparatively recent period by statute.

(4) That if a man made a will of personal property he was and is said to die *testate*, and he himself was and is called a *testator*, and the person appointed by him to carry out his wishes and wind up his estate was and is called his *executor*.

(5) That if a man died without making a will he was and is said to die *intestate*.

(6) That on the death of intestates the crown originally claimed their personal property as *parens patriæ*.

(7) That the crown granted its right as a franchise in many cases to the lords of manors.

(8) That subsequently the crown invested the prelates with the right to administer the estates of intestates.

(9) That the reverend prelates, good men as they were supposed to

be (on the ground of their goodness and spirituality it was that the prerogative was given them), grossly abused the powers given to them, and applied the whole of the deceased's property for their purposes, refusing even to pay his debts, and that, when compelled by statute to pay the debts in the first place, they still had the residue at their own disposal.

(10) That to remedy the flagrant abuses of the prelates, it was provided in Edward III.'s reign that these prelates should depute the nearest and most lawful friends of the deceased to administer his goods, and the persons so appointed were called *administrators*.

(11) That the ecclesiastical courts—the courts over which the prelates presided—having jurisdiction with regard to intestates' estates assumed jurisdiction over the wills of persons dying testate, and retained this jurisdiction until it was taken from them and vested in the Court of Probate in 1857, and that the jurisdiction of the Court of Probate is now absorbed in the High Court of Justice, and is exercised by the Probate, Divorce and Admiralty Division of that Court.

The next question considered in the Commentaries is—

II. *In what manner and with what requisites must a will of personal property be made?*

All persons *who are of sound mind and memory and are not under any restraint of will by duress* can make a will of their personal property. To which general sweeping rule, however, the following exceptions exist:—

(a) *Married women*—for any personal property of theirs belongs in general to their husband. In the following cases, however, a married woman may make a will of personal property—

- (1) If the husband assents to the will; this assent may be revoked at any time before the will is proved.
- (2) The Queen Consort without this assent may make a will.
- (3) Of property settled to her separate use.
- (4) Of her statutory separate use property (*i. e.* of property belonging to her for her separate use under the Married Women's Property Act, 1870).
- (5) Of property vested in her as executrix (*i. e.* she can appoint another executor to succeed her).
- (6) Of property acquired by her after obtaining a protection order or a judicial separation under the Divorce Act, 1857.



- (7) When her husband is *legally* dead (*i. e.* when he has been continuously unheard of for *seven* years).
- (8) Of property over which she has a power.
- (b) *Infants*—except an infant seaman or soldier in actual service, who, it seems, can still make a *nuncupative* will, the Wills Act, 1837, which provides that no will of a person under twenty-one shall be valid, not applying to nuncupative wills by soldiers and sailors.
- (c) Persons *non compos mentis*.

The solemnities to be observed in the execution of a will of personal property, *made by a person residing at the time in the jurisdiction of the High Court*, since the passing of the Wills Act, 1837, are the same as those required with regard to wills of real property, and you will remember what those formalities are from what appeared in the Chapter in Vol. I. relating to devises (see *ante*, p. 83.)

With regard, however, to wills of personal property made by persons not so within the jurisdiction of the High Court you must carefully observe the provisions of 24 & 25 Vict. cc. 114 and 121, set out in p. 189 of the Commentaries; and with regard to the term *domicile* there made use of, bear in mind that it means the place where a man makes his *home*.

The next question considered is—

### III. *How administration is granted.*

As you have seen, the ordinaries were, by a statute passed in Edward III.'s reign, bound to grant administration to the most lawful and nearest of the friends of the deceased intestate, and the rules which guided the ecclesiastical courts in determining to whom administration should be granted are now followed as a general rule by the judge of the High Court exercising jurisdiction in probate matters. From these rules, which are given in the Commentaries, you will gather :—

- (a) That a husband has an original right of administration.
- (b) That the widow or next of kin is entitled to take out letters of administration, and the grant may be made to the widow or to the next of kin, or to both, at the Court's option; but generally the widow is preferred.
- (c) Where there are several next of kin of equal degree administration may be granted to such of them as the Court thinks right.
- (d) Where there are no next of kin the Crown is entitled to administer.

(e) A creditor may apply for administration where there are no other representatives, but administration will not be granted to him until he has duly advertised for the next of kin.

(f) That the nearness of degree to the deceased is reckoned according to the old civilian rules as given in the Table of Consanguinity in the Commentaries.

(g) That no preference is given to the kinsmen of the whole blood, over those of the half blood, nor to relations *ex parte paternâ* over relations *ex parte maternâ*.

The above rules suppose a case in which a man has died intestate, and the administration granted is a *general* one; but letters of administration are sometimes required in other cases than intestacy, and they are called *limited* administration. They consist of—

(a) *Administration cum testamento annexo*.—This is granted when the deceased made a will but appointed no executor, or the executor appointed refuses to act, or dies before the testator. The administration is generally given to the residuary legatee, the right to administer following the right of property, and the Court considering that the residuary legatee will be spurred on towards effecting a settlement of the personal estate by motives which would not actuate other legatees. The administrator so appointed must of course carry out the provisions of the will.

(b) *Administration cum testamento annexo et durante minore ætate*.—Granted when an infant is sole executor under a will. The guardian of the infant is usually appointed. The administration ceases immediately the infant attains his majority.

(NOTE.—This administration is not necessary if there be several executors, for executors have a joint and several authority, and can act without the infant until he attains majority, unless it is necessary for them to bring or defend an action; for this purpose they have only a joint authority, and an administrator to act for the infant executor would have to be appointed.)

(c) *Administration durante absentia*.—Granted when a sole executor is out of the kingdom, and lasting until he returns.

(d) *Administration pendente lite*.—Granted when a suit is pending touching the validity of a will or the right of administration.

(e) *Administration de bonis non administratis*.—Granted when an executor dies, *without having appointed another executor*, or when an administrator dies, *whether he has or has not appointed an executor*,

before having fully wound up the estate of the deceased testator or intestate.

(f) *Administration jus habentium seu interesse*.—Granted when a sole executor becomes lunatic before taking the grant. The grant is made to the lunatic's committee, if he have one, and if not, to the residuary legatee under the will, and the grant continues until the lunatic becomes sane.

(g) *Administration ad colligendum bona defuncti*.—Granted to some discreet person, approved by the Court, in any necessary cases, to keep a deceased person's goods in safe custody for the benefit of persons entitled thereto. The person so appointed is neither executor nor administrator.

The fourth and last question considered in this Chapter is—

IV. *What are the chief points to be observed in relation to the office of an executor and an administrator?*

Executors and administrators differ in the following respects :—

(a) An executor derives his appointment from the will, and not from the probate, so that he can immediately on his testator's death do any act connected with the estate; whereas an administrator derives his appointment from the Court, and until the appointment is made he cannot interfere with the estate of the deceased without rendering himself liable as an executor *de son tort*.

(b) An executor is bound to perform a will; an administrator is not, unless he is *administrator cum testamento annexo*.

(c) If there are several executors, they have for most purposes a joint and several authority, while it seems (though the point is doubtful) that administrators have only a joint authority, *i.e.* one cannot act without the other.

(d) Executors can transmit their office by will, but administrators cannot.

Bearing these distinctions in mind, you may consider that executors and administrators are much in the same position, and represent for all purposes the deceased testator or intestate, as far as his personal estate is concerned. The duties of an executor, as well as of an administrator, are as follows, and must be performed in the order below :—

(a) To bury the deceased in a manner suitable to his estate.

(b) To prove the deceased's will, or take out letters of administration to his estate in the proper court.

(NOTE HERE wills are proved in the *Registries* of the Court of Probate. These registries are divided into several district registries and one principal registry. The former are for the convenience of persons residing in the country, for all simple probate and administrative cases, and can be conducted in the registry of the district in which the deceased had at the time of his death a fixed place of abode. The principal registry, which is fixed in London, can dispose of every kind of probate and administrative business, whether the deceased died in its own particular district or not.)

Wills can be proved either in *common form*, the usual way, constituting the non-contentious part of the business of the Court of Probate, or in *solemn form per testes*, when the proceedings are said to be *contentious*, and this mode of probate can only be had in the principal registry.

Probate in solemn form is an advisable course for the executor to adopt where there are serious doubts as to the validity of the will, or there is for some other cause a risk of its being contested at a future date; when proved in this manner it becomes absolutely binding, and can only be revoked by the discovery of a later will.

County courts have jurisdiction in *contentious* probate business when the personal estate is under 200*l.*, and the real estate under 300*l.*, and under a recent act these courts have jurisdiction to grant simple administration to the widow or children when the estate does not exceed in value 100*l.* (36 & 37 Vict. c. 52, as extended by 38 & 39 Vict. c. 27).

(N.B.—Probate actions cannot be commenced in the district registries established in various parts of the country under the Judicature Acts and Rules.)

(c) To make a correct inventory of the testator's or intestate's personalty.

(d) To collect and call in the testator's or intestate's estate. This he must take care to do, for he is responsible to the extent of the *assets* which come to his hands, and this includes property which he might have obtained by using due diligence to sue for or get in.

[NOTE HERE an executor or administrator is personally liable beyond the assets which come to his hands in the following cases:—

(1) For funeral expenses incurred by his order.

- (2) For monies due under a bill of exchange or promissory note, drawn, accepted, made, or indorsed by him.
- (3) For the costs of an action brought by or against him, *unless otherwise ordered by the court* (3 & 4 Will. 4, c. 42). (In these cases the court generally orders that the costs be paid out of the deceased's estate if there are assets, and if not, then out of the executor's personal estate; but if the action is wrongly brought or defended, the order generally is that the costs be paid in the first instance by the executor or administrator.)
- (4) In all cases in which for some proper consideration he has specially promised to be personally responsible, the promise being contained in writing, duly signed by him, or by his duly-authorized agent. Sect. 4 of Stat. of Frauds.]
- (e) To pay the debts of the deceased. In doing this he must observe the priorities given by law to any particular creditors. These priorities are:—
  - (1) Funeral and testamentary expenses.
  - (2) Crown debts, whether by specialty or simple contract.
  - (3) Debts having a priority over others by statute, *e. g.* sums received by overseers of the poor by virtue of their office (17 Geo. 2, c. 38), or by officers of Friendly Societies (33 Geo. 3, c. 54, s. 10).
  - (4) Debts of record, *e. g.*, judgments, decrees in equity and orders in bankruptcy, recognizances, statutes staple and statutes merchant.
  - (5) Judgments not registered, specialty and simple contract debts (specialty creditors had a priority over simple contract creditors with regard to persons dying before 1st January, 1870, but this priority was taken away by 32 & 33 Vict. c. 46, as to persons dying after that date), including landlords' claims for rent.
  - (6) Lastly come voluntary bonds given by the deceased; but these will rank with creditors in class No. 5, if they have been assigned for value.

These priorities were recognized even in equity, when the estate was being administered by the court with regard to *legal* assets, that is, property out of which the creditors were entitled to obtain payment of their debts in a court of law, and also with regard to *equit-*

*able assets, i. e., property only available in equity for payment of debts, except that as to persons dying before 1st January, 1870, the priority of specialty creditors over simple contract creditors, recognized in dealing with legal assets, was not observed when dealing with equitable assets, in other words, that specialty contract creditors and simple contract creditors always ranked equally as far as equitable assets were concerned, as they now do with respect to legal assets. The above priorities are still observed by the court when winding-up the estate of a deceased person, notwithstanding sect. 10 of the Judicature Act, 1875, provides that the bankruptcy rules by which creditors are paid *pari passu* shall be observed. (See *In re Withernsea Brickwork Co.*, 50 L. J., Ch. 185, and the Author's Aids to Equity, p. 64.)*

With regard to the debts of the deceased, the executor (and administrator) has the following powers:—

- (1) He may retain his own debt before paying other creditors of equal degree, even though the debt be statute-barred. This important right, which is more fully treated of in Book V. of the Commentaries (see *post*, Bk. V. ch. ii.), known as “an executor’s right of retainer” (applying, however, equally to an administrator), has not been taken away by the Judicature Acts. An executor *de son tort*, i. e., a person, who, without being duly appointed an executor officiously meddles with a deceased person’s estate, has not this right of retainer.
- (2) He has the right to pay creditors, although their debts are statute-barred, for he cannot be compelled to plead the Statutes of Limitations.
- (3) Among creditors of equal degree he can prefer one to another.
- (4) Under the Conveyancing Act, 1881, he may do the following things—(i) pay claims upon such evidence as he thinks sufficient; (ii) accept a composition for a debt; (iii) allow time for payment of debts; (iv) compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever connected with the estate.
- (5) If sued after he has distributed all the assets which have come to his hands he can meet the action by a plea of *plene administravit* (full administration of the assets). Here the creditor can, on proving his claim, obtain judgment *quando acciderint*, that is, that he shall be paid out of any assets (if any) which subsequently come to the executor’s hands.

- (6) If sued after he has distributed all the assets, except a part set aside to meet a claim of a higher rank due from the deceased, he can meet the action by a plea of *plene administravit præter* (full administration except as to the sum so set aside).
  - (7) He may assign a lease and convey property subject to a rent charge; and free the estate from further liability respecting the performance of the covenants or the payment of the rent charge, provided he follows the requirements of the act enabling him to do this. (See ss. 27, 28 of 22 & 23 Vict. c. 35.)
  - (8) He may give notice in the newspapers to creditors and others to send in their claims by a particular time, and after this time distribute the assets among those persons of whose claims he has notice without incurring liabilities to those who have failed to send in notice of their claims; the latter having, however, the right to follow the assets in the hands of any legatees or other volunteers. (See s. 28 of 22 & 23 Vict. c. 35.)
- (f) To pay the legacies. First, deducting the legacy duty, unless the legacy is given free of duty. There are three kinds of legacies, viz. :—
- (1) *Specific*, e. g. a gift of testator's black horse, "Dobbin." This is liable to *ademption*, i. e. it is adeemed or taken away if at the testator's death "Dobbin" is not in his possession.
  - (2) *General*, e. g. a gift of a horse generally, without specifying any particular one. This gift will be satisfied by the delivery of any horse the executor likes; and unless the testator's estate is exhausted by the debts the legatee gets his legacy,—general legacies not being liable to ademption.
  - (3) *Demonstrative*, e. g. a gift of 100*l.* payable out of the testator's stock in the Bank of England; in other words, a general legacy payable out of a specified fund, and not liable to ademption, inasmuch as if the particular fund out of which it is primarily payable is not in the testator's possession at his death, the legatee can claim payment out of the general personal estate.

If the assets are insufficient to pay all legacies, specific and demonstrative legacies, and legacies for value are paid before general voluntary legacies, and these last must all abate rateably.

Legacies are also divided into *vested* and *contingent* legacies. A gift to A. on his attaining twenty-one is a contingent legacy, while a gift to A., *payable* or *to be paid* on his attaining twenty-one is a vested legacy, the time of *payment* only being postponed. In the former case, if A. dies before he attains twenty-one, although he survives the testator, the legacy lapses, while in the latter case it would not, but would be payable to A.'s personal representatives. Legacies also lapse and sink into the residue where the legatee dies before the testator, unless he be a child or other issue of the testator, and die leaving issue, for here the legacy is payable just as if the legatee had died immediately after the testator.

Legacies should be paid about a year after the testator's death. After that time general legacies carry interest at 4l. per centum per annum. Legacies given to children, however, if there is no other sufficient fund for their maintenance, specific and demonstrative legacies, and legacies charged on land, carry interest from the testator's death.

If a legacy given to A., and *in case he die without issue* to B., the gift to B. was formerly altogether void as offending the rule against perpetuities; but by the Wills Act, 1837, under such a gift A. will now take a life interest, enlarged into an absolute interest if at his death he has issue living, with an executory gift over in favour of B., if A. dies without leaving such issue.

(g) To distribute the residue. The residue, after all debts, legacies, and other charges are paid, must be handed to the residuary legatee (if one), and if no such legatee appointed, then to the testator's or intestate's next of kin, according to the Statutes of Distribution. You may find some difficulty in understanding the order in which the next of kin take. To assist you I add on a subsequent page, see *post*, p. 183, an explanatory table. You must observe particularly—(i) That the half-blood and ancestors were always entitled to a share of the personalty, although before 1834 they were excluded from inheriting real property. (ii) That when children take in the place of their parents they are said to take *per stirpes*; but when they take in their own right they take *per capita*. These terms I have already endeavoured to explain to you in connection with the Chapter on Descent in Volume 1 of the Commentaries (*ante*, p. 52). (iii) That among collaterals no representatives are admitted further than the children of deceased brothers and sisters. (iv) That females are admitted equally with males. (v) That any children who have been



advanced by the intestate in his lifetime cannot share in the residue without bringing the sums advanced into *hotchpot*, and accounting for the same. (vi) That the widow, if one, does not derive any benefit from this bringing into hotchpot, for she takes the third of what the testator dies possessed of (after payment of debts, &c.), and not of the residue as swelled by the sums brought in.

The above are some of the most important points in this Chapter, and if you get them up not only will you be easily able to answer any question which is likely to be set on the subject at the Intermediate, but you will have acquired a knowledge of the law of wills and administration, which will prove very valuable to you when you prepare yourself for the questions in the Probate Paper at your Final Examination; the knowledge of the fact that there is this Paper at the Final has induced me to go into this subject at perhaps somewhat an unnecessary length for Intermediate Examination purposes.

#### POINTS TO NOTE.

- I. What the meaning of the following terms respectively is:—*Jus relictæ, legitim, nuncupative wills, bona notabilia, collatio bonorum.*
- II. What the rules were which prevailed prior to the Wills Act, 1837, with regard to the solemnities to be observed in executing wills of personal property.
- III. In granting letters of administration, which of the following relations of the deceased are preferred, and why—(a) Children or parents; (b) brothers or grandfathers; (c) the half or whole blood.
- IV. B. is the executor of A. B. dies before completely winding-up A.'s estate. B.'s executor is C. Whether C. represents A. or not; and whether the result would have been the same if—(i) B. had been A.'s administrator, or (ii) C. had been B.'s administrator.
- V. Leasehold property is given by will to A. A. agrees to sell it to B., your client. Whether or not you would require the executor of the will to join in the assignment.
- VI. Whether or not executors under a will are entitled to hold for their own benefit the residue of the testator's personal estate in cases where the will contains no residuary gift. (See 1 Will. 4, c. 40.)

VII. What is meant by the "Statute of Distributions."

VIII. A. dies intestate possessed of 10,000*l.* personal property. His relatives are a widow, two sons and a daughter. In his life-time A. had advanced one son 1,000*l.*, the other 2,000*l.*, for the purposes of their business and the daughter 500*l.* on her marriage. How A.'s 10,000*l.* will be divided.

IX. An executor refuses to pay a legacy given to A. To what court A. would resort to compel payment, and how far the point is affected by the Judicature Acts and Rules.

X. In what cases (a) County Courts, (b) the Common Law Courts can entertain proceedings for recovery of a legacy.

**Conclusion.—Of some Mixed or Irregular Subjects of Property.**

#### REMARKS.

This Chapter in the first place treats of—

- I. *Certain things which, although in themselves real, yet partake in some respects of the nature of things personal.* Under this head are included :—
- (a) *Emblements*, or the growing crops upon land produced annually by cultivation.
  - (b) *Fixtures*, or things of an accessory nature affixed to houses or lands.
  - (c) *Shares in public undertakings connected with land.*

In the second place this Chapter treats of—

- II. *Things personal which in some respects partake of the nature of things real.* These include :—
- (a) *Animals feræ naturæ*, or wild animals, already considered (*ante*, p. 102).
  - (b) *Heirlooms*, or things of a personal nature, which by virtue of some special custom of a particular place go to the heir or devisee with the lands with which they are connected. Heirlooms are, in fact, nothing but "limbs or members of the inheritance," from which they cannot *by will* be severed.

You will not, I think, find any difficulty in understanding the contents of this the concluding Chapter of Book II., and I will merely add the principal points in connection with the Chapter for you to look up.

#### POINTS TO NOTE.

##### I. What *emblems* are.

II. A., the owner in fee of lands, dies intestate, to whom the following species of property on his lands will pass, his heir or personal representative :—(a) growing timber ; (b) timber cut in A.'s lifetime ; (c) growing grass ; (d) growing corn ; (e) growing clover ; (f) fruit on the trees. And whether if A. had devised the land to B., B.'s rights would be the same as those of the heir of A.

III. Whether or not a sheriff can under a writ of *fieri facias* issued against a tenant in fee sell grass or corn growing upon the tenant's lands, and whether a landlord can distrain such things for his rent.

IV. What *fixtures* are, what the old Latin maxim connected with them was, and what the definition of the term fixtures given in the Commentaries implies.

V. A., the owner in fee of a house dies, to what fixtures attached to the house the heir (or devisee) of the house and the personal representative of A. are respectively entitled.

VI. A. being tenant for a term of years and B. being his landlord, what fixtures erected by him A. will be entitled to remove, and *when* the removal must be made.

VII. How the law of fixtures has been affected by 14 & 15 Vict. c. 25 and 38 & 39 Vict. c. 92.

VIII. Whether or not under an execution or a distress against A., tenant of a house under a lease for 21 years, the fixtures which he has affixed to the house can be seized and sold, and whether there would be any difference if A. were tenant for life of the premises.

- IX. For what purposes shares in public undertakings relating to land are deemed real property, and whether the interest in any surplus profit belonging to the individuals who constitute the partners in the undertaking is considered as real or personal property.
- X. Whether shares in companies registered under the Joint Stock Companies Act, 1862, are deemed real or personal property (see foot-note, p. 219).
- XI. A. dies seised of lands which by his will he has devised to B.; A.'s personal representatives claim the deeds relating to the lands given to B.; whether, acting for B., you would advise him to resist or give way to the claim.
- XII. Whether if in the last case supposed A. had deposited the deeds with a pawnbroker to secure an advance, and the pawnbroker died intestate having still the possession of the deeds, whether his (the pawnbroker's) heir or personal representatives would be entitled to the deeds.
- XIII. To whom a tombstone or monument in a church belongs, the heir, devisee, or personal representative of the person who erected it, or to the parson.
- XIV. Derive and define the term "heirloom," and give a list of heirlooms.
- XV. Whether or not the crown jewels are properly considered heirlooms.
- XVI. Whether the right of the heir to heirlooms can be destroyed by the tenant in fee selling the thing constituting the heirloom in his life-time or by his devising it away by his will.
- XVII. Show why it is wrong to consider pictures or plate which have been given by will to the devisee of the family mansion as heirlooms.

## BOOK III.—OF RIGHTS IN PRIVATE RELATIONS.

The four Chapters devoted by the author of the Commentaries to a consideration of these rights you will, or ought to, find most interesting—they treat of very important subjects for Examination purposes, and relate to—I. The law of *Master and Servant*; II. The law of *Husband and Wife*; III. The law of *Parent and Child*; IV. The law of *Guardian and Ward*. Taking the Chapters in their order we have in the first place—

## Chapter I.—Of Master and Servant.

## REMARKS.

The first question discussed is—

I. *What are the several sorts of servants?*

Although our law admits of no such thing as *slavery*, and immediately a slave reaches our shores or puts his foot on to the deck of an English man-of-war he becomes a *freeman*, yet the law upholds contracts whereby one person surrenders to another his natural right of free action for a certain time in consideration of some proper remuneration—known generally as *wages*—for such contracts are in no way degrading, but, on the contrary, of a nature beneficial to both parties.

The three sorts of servants are (a) *menial* or domestic servants, (b) *labourers* or *workmen*, (c) *apprentices*.

A few words as to each of these classes—

(a) *Menial servants* (or *indoor servants*). Contracts for the employment of these persons may of course be for a definite time, but as a rule the engagement by which they are hired is of a general nature, and in that case it is considered as a hiring for a year, subject to determination by a month's notice on either side, or by the forfeiture or payment of a month's wages.

[N.B. Governesses, tutors, and clerks, although engaged to perform services *intra mœnia* (within the walls) are not menial servants, and a general engagement of such persons is, as a rule, considered as a yearly engagement determinable by three months' notice on either

side, or by the forfeiture or payment of wages or salary for that period.]

(b) *Labourers or workmen*—i. e. servants employed in husbandry or engaged in trades or manufactures, generally by the day or the week. In connection with this class of servant you must particularly notice the provisions of 30 & 31 Vict. c. 141, given in the Commentaries, p. 227, and of "The Employers and Workmen's Act, 1875," 38 & 39 Vict. c. 90.

(c) *Apprentices*—(so called from the French *apprendre*, to learn)—a species of servants who are bound by indenture to serve their masters for a certain term, the masters on their part undertaking to maintain and instruct them during the term. Apprenticeship generally occurs in connection with trade. Differences arising between masters and apprentices are settled by justices of the peace.

The second question discussed is—

## II. *How does the relation of service affect either the master or the servant?*

With regard to this it may be useful to state the duties and rights—(a) of the master; (b) of the servant.

### (a) *Master's duties and rights.*

- (1) To provide his servant (whether a domestic servant or an apprentice) with food and lodging;
- (2) To provide his apprentice (but not his domestic servant) with medical attendance and medicine in case of sickness and also, in the absence of contrary agreement, with clothing;

[NOTE.—If a master orders a doctor to visit his domestic servant he has no power to deduct the doctor's charge from the wages.]

- (3) To chastise his apprentice (but not his domestic servant), but the chastisement must be done with moderation;
- (4) Not to discharge a domestic servant without good cause, except upon a month's notice or the payment of a month's wages.

[NOTE HERE, that if a master neglects to perform duties Nos. 1 and 2 or does any bodily harm to his servant, whereby the latter's life is endangered or his health permanently injured, he is guilty of a misdemeanor and liable to punishment under 24 & 25 Vict. c. 100, s. 26. If a servant is injured by the negligence of a fellow-servant, the master was formerly not responsible unless the negligent

servant was grossly incompetent to perform his part of the work, but now, in certain cases, he is under the Employers' Liability Act, 1880.]

(b) *The servant's duties—*

- (1) To obey all the lawful commands of his master;
- (2) Not to absent himself without leave;
- (3) To protect as far as he is able his master's property, although he is not liable for a robbery of goods in his possession if he himself were free from blame;
- (4) To give, if a domestic servant, a month's notice before leaving, or to forfeit a month's wages. But if beaten by the master or mistress, a domestic servant can leave without notice.

A domestic servant may be dismissed without any wages beyond those which have actually accrued due, and without any notice, in the following cases:—

- (a) When he habitually neglects the *lawful* commands of his master;
- (b) When he absents himself without leave;
- (c) When he is guilty of gross moral misconduct;
- (d) When he is unable to do the work undertaken.

A domestic servant is entitled to wages *pro rata* up to the time of dismissal when— (a) the engagement is put an end to by mutual consent; (b) when the servant becomes disabled by sickness from fulfilling his duties.

A domestic servant is entitled to maintain an action for damages against his master for sudden dismissal, in other cases than those given above.

An action also lies at the suit of the servant for a false character *maliciously* given by the master.

[N.B.—A master is not bound to give his servant a character at all, but if he does give one, unless the character given is *bonâ fide*, the master is liable to an action for damages for any injury resulting from the character.]

The third question discussed is—

III. *How are strangers affected by this relation of master and servant?*  
And herein—

- (a) *What may a master do for, i. e. on behalf of, his servant?*

- (1) He may assist him to bring and defend actions without being guilty of the common law offence of *maintenance*.
  - (2) He may commit an assault in defence of his servant without incurring responsibility.
  - (3) He may bring an action for injury committed to his servant.
  - (4) He may bring an action against any one who induces his servant to leave him, and thereby deprives him of the servant's services.
- (b) *What may a servant do on behalf of his master?*
- (1) A servant is his master's agent to do all things coming *within the scope of his employment, i. e.* a master is responsible for his servant's contracts if entered into in the course of his duties as servant. *Qui facit per alium, facit per se* (he who acts through another acts through himself).
  - (2) The rule just given applies equally to torts, not amounting to crimes, and to acts of mere negligence, committed by a servant *in the course of his employment*.
  - (3) The rule does not apply to the criminal acts of the servant, unless done with the encouragement or express command of the master.

## POINTS TO NOTE.

- I. Over what period it was formerly necessary for all apprenticeships in trade to extend.
- II. What some of the most important statutory enactments relating to apprentices are.
- III. Whether or not there is any other class of servants besides menial (or domestic) servants, labourers (or workmen), and apprentices.
- IV. What the penalty incurred under 32 Geo. 3, c. 56, relating to the obtaining and giving of false characters is.
- V. Whether or not in all or any of the following cases A., the master, is liable for B., his servant's, acts.

*Case A.*—A. gives B. money to buy goods at a shop at which A. has been in the habit of buying goods on credit through B.'s agency. B. pockets the money, and pledges A.'s credit.



*Case B.*—A. gives B. money to buy goods at a shop in which A. has not been in the habit of buying goods on credit. B. pockets the money, and pledges A.'s credit.

*Case C.*—B., when driving A.'s carriage, and strictly keeping to the route commanded by A., negligently runs over a child and injures it.

*Case D.*—B. does the same thing when driving A.'s carriage, but at the time of the child being run over he was going down a street which his master had strictly commanded him not to go down.

## Chapter II.—Of Husband and Wife.

### REMARKS.

The first question considered is—

#### I. *How a marriage may be contracted?*

In any of the following ways, provided the parties be both unmarried, of sufficient age, and not related to each other within the prohibited degrees, of sound mind and corporal capacity.

(a) *By special licence* issued by the Archbishop of Canterbury's officers; under this licence the marriage may take place in any church or chapel, or other convenient place, and at any time.

(b) *By common licence, i. e.* a licence from the ordinary (or bishop) of the place or his surrogate. This is granted on the applicant swearing to the following facts:

- (1) That there is no impediment of kindred or other cause.
- (2) That one of the parties to the marriage contract has resided in the parish where the marriage is to take place for fifteen days.
- (3) That if one of the parties be a minor (not being a widow or widower) the consent of his or her father, mother or guardian has been obtained, or that there is no such father, mother or guardian.

(c) *By publication of banns.* The banns must be published for three successive Sundays in the church or chapel in which the marriage is to be solemnized.

In all three cases the marriage must be performed by a person in holy orders, and in the presence of two witnesses; and in the last two cases the marriage ceremony must take place between the hours

of *eight and twelve* in the forenoon, and within three months of the date of the licence, or after the complete publication of the banns.

(d) *By the Superintendent Registrar's certificate, without licence.* This form of marriage was established by 6 & 7 Will. 4, c. 85, for the convenience of dissenters and others who do not like to be married according to the rites of the Church of England. The proceedings connected with this form of marriage are :—

- (1) One of the parties gives a written notice to the registrar in whose district both parties have resided for *seven* days, or if they have resided in different districts then each party gives a notice to the district registrar of his or her district.
- (2) The registrar enters the notice in his marriage notice book.
- (3) The notice referred to states the building where the marriage is to take place, which generally must be within the registrar's district.
- (4) The notice is accompanied with a declaration to the same effect as the oath taken before the surrogate in connection with a marriage by banns except that the residence declaration is *seven* instead of *fifteen* days.
- (5) The notice must be affixed by the registrar in some conspicuous place in his office during the twenty-one days immediately succeeding the day of its entry in the marriage notice book.
- (6) At the expiration of the twenty-one days the registrar issues his certificate (unless such issue is during these twenty-one days forbidden).
- (7) At any time within three months of the issuing of the certificate the marriage can take place.
- (8) The place of marriage may be—(i) a church of the Church of England; (ii) at any place of religious worship certified for public worship and registered for marriages; (iii) at the registrar's office; (iv) at a Jews' or Quakers' meeting-house.
- (9) If the marriage takes place at the registrar's office no religious service must be read.
- (10) The marriage is completed by its being entered in the register book of marriages.

(e) *By a Superintendent Registrar's certificate with licence.*

The proceedings in this form of marriage are much the same as

those just described, except that the time of residence within the registrar's district is fifteen days, and the marriage may be solemnized according to the Church of England ceremony, and the certificate may be obtained at the expiration of *one* day instead of *twenty-one* days after the entry of the notice in the marriage notice book.

The second question considered is—

II. *What is the legal effect and consequence of the marriage?* The effect is particularly considered as to (a) *the wife's person*, (b) *her property*, (c) *her contracts and other transactions*.

(a) The wife's person belongs from the time of the marriage to the husband, who had, in the olden days, power to administer to her moderate chastisement. This, however, he has no right to do at the present time, his power over her person only extending to restrain her liberty in the event of any gross misbehaviour.

(b) *As to wife's property.*

*First, as to her REAL property, i. e. her lands of freehold, copyhold, and customary freehold tenure.*

The freeholds which belong to the wife at the marriage, and which come to her during coverture, the husband has the following rights in—

(i.) He takes the rents and profits during coverture:

(ii.) He can without his wife's consent lease the lands for twenty-one years under the provisions of "The Settled Estates Act, 1877." (See *ante*, p. 27.)

(iii.) He has on his wife's death a life estate in the lands as tenant by the *curtesy of England* in certain cases. (See *ante*, p. 25.)

The lands are not liable to the husband's debts; and subject to this *curtesy of the husband*, on the death of the wife the lands descend to *her heir*. If it is desired to convey the lands, this is done by a deed executed by husband and wife and acknowledged by the latter, and duly registered in the Common Pleas, as fully explained, *ante*, p. 81.

The husband's interests in the copyholds and customary freeholds of his wife will, subject to any custom of the particular manor, be the same as his rights in her freeholds.

*Secondly, as to the wife's leasehold property, i. e. property of which the wife is lessee.* This property passes to the husband whether his wife was entitled to it at the time of marriage or became entitled to it during coverture, and he can dispose of it at any time during coverture by act *inter vivos* but not by his *will*; and if he die without

having disposed of it, the wife becomes entitled to it by survivorship; but if the husband survives the property belongs absolutely to him by survivorship.

*Thirdly, as to the wife's chattels personal—*

These, if in possession at the time of the marriage, or if they come into possession during the marriage, belong absolutely to the husband, and he can dispose of them by deed or will, except the *paraphernalia*—i. e., the wife's bed, apparel and ornaments suited to her degree, which he can dispose of in his lifetime but not by his will, and which belong to the wife by survivorship subject to the husband's debts. If the personal property is in action at the time of the husband's death, the wife takes it by survivorship; and if the wife dies while it is still in action the husband takes it in the first place as her administrator, and afterwards he is entitled to it absolutely as his wife's sole representative.

You must bear in mind that the above is the law as it exists entirely independently of the provisions of "The Married Women's Property Act, 1870." The object of this statute was to place a married woman in the position of a *feme sole* for many purposes, even when living with and supported by her husband, a step taken by the legislature in 1857 with regard to wives judicially separated from or deserted by their husbands. (See 20 & 21 Vict. c. 85.) By the Act of 1870 (the principal provisions of which are given, *post*, p. 184), the husband's rights, you will find, on referring to the Act, are considerably curtailed, for by it, if the marriage took place after the 9th August, 1870, the rents and profits of any real property, and the absolute interest in personal property *whatever its value*, including, it seems, leaseholds coming to a married woman under an intestacy, and sums of money not exceeding 200*l.* given to her *by deed or will*, as well as any property which she may acquire by the use of her brains and hands, (and this last, whatever the date of the marriage,) belong absolutely to the wife.

You must notice particularly that the limit to 200*l.* is confined to gifts *by deed or will*. I draw your attention to this because of the mistakes I find my own pupils so often make on the point.

The wife's right in her husband's real property is limited to *dower*, a right which, as you will remember, is now placed completely under the husband's control (see *ante*, p. 26); and she has a right on his death *intestate* to a third part of his personal property if there are children, and one-half if there are no children, as you will also

remember from the Chapter on Title by Will and Administration (*ante*, p. 155). In addition, she has during the coverture, as long as she properly conducts herself, a right to be supported by him and supplied with necessaries suitable to her rank in life.

The above are the rights of the husband and wife in each other's property in the courts of common law with regard to legal estates and interests. The courts of equity from very early times protected the wife from the harsh rules of the common law, and the protection it afforded her was mainly in allowing her to hold and dispose of, free from the control, debts, and engagements of the husband, any property given to her for her *separate use*; and these courts, in order to fully protect the wife and prevent her being compelled by the husband's influence ["his kicks or his kisses"] to dispose of the property so settled for his purposes, allowed the property to be given to her in such a way that she had no power to dispose of it all, either in his favour or in favour of any one else, or as it was and is called, "without power of anticipation." The court may under 44 & 45 Vict. c. 41, bind this property, notwithstanding the restraint, if for the wife's benefit and she consent. Equity further protected the wife in allowing her "equity to a settlement," *i. e.* in compelling the husband to settle upon her a portion of any property which he could not obtain without equity's assistance.

In the absence, however, of any such settlement to the wife's separate use, and of any necessity on the part of the husband to seek the court's aid in recovering his wife's property, the legal rules regulating the husband's and wife's rights in each other's property were followed in equity.

(c) *As to the wife's contracts and transactions.*

After marriage the woman's power of contracting ceases. In the following cases, however, married women can contract as *femes soles*:—(a) With regard to property settled to or belonging to them for their separate use, under the Act of 1870. (b) When they have obtained a protection order under the Divorce Act, 1857. (c) When they have obtained a judicial separation under the same Act. (d) Where the husband is *legally* dead. (e) Where the husband is *civilly* dead. She has also the right to contract as her husband's agent, under the authority which the law considers he impliedly gives her, for supplying herself and the household with necessaries suitable to the husband's rank and fortune. This authority lasts as long as the parties reside together, unless it is revoked by

the husband, and it may be revoked in the following ways:—(a) By the husband forbidding his wife to pledge his credit; (b) by his giving express notice to tradespeople not to trust his wife; (c) by his supplying his wife with necessaries or with money to buy them with. The authority ceases on separation, unless the separation is by mutual consent, or the wife leaves on account of her husband's cruelty or is wrongfully turned out by him; for in these cases the husband remains liable, and he cannot get rid of his liability, for the wife goes forth armed with the husband's authority to pledge his credit for necessaries, and the tradesman who supplies them stands in the wife's place to enforce her right of maintenance, unless the wife is amply provided for, either by having separate property or by the husband making her a suitable allowance.

A few words as to the husband's liability for the ante-nuptial acts of his wife, and the nature of the liability differs according to the date of the marriage. If married before 9th August, 1870, the husband is responsible *during coverture* to all the contracts and torts committed by his wife before marriage, whether he had any fortune with her or not. If married between the 9th August, 1870, and the 30th July, 1874, the husband's responsibility for the ante-nuptial contracts of his wife is taken away by section 12 of "The Married Women's Property Act, 1870," while his liability for her torts remains as if he had been married before 9th August, 1870.

If married since 30th July, 1874, the husband is responsible for both ante-nuptial torts and contracts of his wife to the extent of the assets which he received or might have received with his wife. This provision is contained in "The Married Women's Property Amendment Act, 1874" (37 & 38 Vict. c. 50), an act passed to prevent the frauds practised on tradesmen by means of the provisions of the Act of 1870, which took away the husband's responsibility for the ante-nuptial debts of his wife.

The third question considered in the Commentaries is—

### III. *How may a marriage be dissolved or declared a nullity?*

Before the establishment of the Court for Divorce and Matrimonial Causes in 1857, proceedings by or on behalf of either husband or wife who could not for some reason live happily together, were taken in the ecclesiastical courts, and these courts could make the following decrees:—

(1) A decree of divorce *à mensâ et thoro* (from board and bed). This decree was made when it could be shown that for some cause arising after marriage the married parties could not live happily together, *e. g.* gross cruelty on the part of the husband, adultery, and (according to Blackstone) "an intolerable bad temper" in either party. The effect of this decree was not to dissolve the marriage knot and enable the parties to marry again, but simply to enable them to live in separation. The husband was generally ordered to make a certain allowance to his wife for her proper support, known as *alimony*.

(2) A decree of divorce *à vinculo*. This decree could only be made if the marriage was from its conception illegal, owing to some canonical disability, *e. g.* that the parties were related to one another within the Levitical degrees.

The effect of this decree was to place the parties in the position they were before the marriage took place, to make any children there might have been of the marriage bastards, and to enable the parties to marry again at their pleasure.

The ecclesiastical courts, however, could not under any circumstances, where the marriage was legal in itself, order a divorce *à vinculo*, for this could, prior to 1857, only be effected by means of a private Act of Parliament. In that year the jurisdiction of the ecclesiastical courts in matrimonial matters was transferred to the court already referred to, *viz.* the Court for Divorce and Matrimonial Causes, the jurisdiction of which court is now exercised by the proper Judge of the Probate, Divorce, and Admiralty Division of the High Court. In this Division the following decrees in matrimonial matters can now be obtained :—

1. A decree for *judicial separation*, granted on the ground of adultery, cruelty, or desertion for two years or upwards without cause, or for unnatural practices on the part of the husband. The effect of this decree is much the same as the effect of the former decree *à mensâ et thoro*, and the wife is in the position of a *feme sole* as to contracting, holding property, suing and being sued. This decree of judicial separation may now be granted by justices of the peace, when a husband has been convicted of an aggravated assault on the wife, under the Matrimonial Causes Act, 1878.

2. A decree of *divorce*, *i. e.* for dissolution of the marriage. This is granted, if the husband is the petitioner, for his wife's adultery, and in

this case the husband may claim damages from the co-respondent, *i. e.* the person accused of committing adultery with the wife ; and *if the wife is the petitioner*, for any of the following acts on the part of the husband ; (a) incestuous adultery ; (b) adultery, coupled with cruelty ; (c) desertion without reasonable cause for two years or upwards ; (d) rape, or unnatural crime.

The defences to these proceedings are of two kinds, *absolute* or *discretionary* ; the former, if proved, leave the court nothing to do but dismiss the petition ; the latter give the court a discretion as to the decree. The absolute defences are—

- (a) *Denial* of the facts alleged in the petition ;
- (b) *Connivance*. This must be acquiescent, intentional, and criminal ;
- (c) *Condonation*. This must consist of a full knowledge of the facts, forgiveness, and subsequent cohabitation ;
- (d) *Collusion* between the petitioner and any of the respondents.

The discretionary defences are—

- (a) Adultery by petitioner ;
- (b) Unreasonable delay in presenting or prosecuting the petition ;
- (c) Cruelty by the petitioner ;
- (d) Neglect or misconduct by the petitioner conducing to the respondent's adultery.

The decree made at the hearing of a suit for *divorce* is a decree *nisi* only, and does not become absolute for six months, and during these six months the parties are not able to marry again, and anyone may, through the intervention of the Queen's Proctor, show cause why the decree should not take effect, and such order for further inquiry or otherwise may be made as may be necessary.

The effect of the decree is to enable the parties to marry again.

(3) A decree of *nullity of marriage*, granted on any grounds in which the former decree of divorce *à vinculo* was granted, *e. g.* for (a) invalidity in the performance of the marriage ; (b) the parties being related to one another within the prohibited degrees ; (c) that the marriage was contracted under duress or fraud ; (d) that either of the parties is impotent to fulfil the obligations of matrimony.

(4) A decree for *restitution of conjugal rights*, granted on the ground that one of the parties has withdrawn from living with the other without lawful cause.



(5) A decree of *jactitation of marriage*. This is a decree of perpetual silence against a person who boasts (the *jactitator*) that he or she is married to some other person.

The Court may also make the following (among other) orders:—

(1) Reverse a decree for judicial separation. This order will be made if it can be shown that the separation was obtained during the absence of the party applying, or that (if granted on the ground of desertion) there was good cause for the desertion.

(2) *Provision for the wife* in the shape of *alimony*. This may be granted during the suit, when it was called *alimony pending suit*, or at the decree (or *after* the decree in the case of judicial separation) when it was called *permanent alimony*. Alimony is not generally decreed unless the wife is innocent of adultery.

(3) *Concerning the settlement of property*. After judicial separation or divorce the Court may order a settlement of the wife's property for the benefit of the innocent party and the children (both or either). It can also, *after* decree for divorce, inquire into the existence of any ante-nuptial or post-nuptial settlements, and divert, for the benefit of the parents or children, the income of any property contained in such settlements. This may now, under the Matrimonial Causes Act, 1878, be done whether there are children of the marriage or not.

Other points for you to remember in connection with this Chapter—which I have considered at perhaps a greater length than there is any necessity for the purposes of the Intermediate, but a knowledge of which you will find very useful when you commence getting up your Divorce Law for the Final—are:

#### POINTS TO NOTE.

- I. What the various disabilities are which make a marriage void or voidable, and how *canonical* and *civil* disabilities differ.
- II. Whether or not at the time of marriage a pre-contract by one of the parties to marry another person is now or was ever a disability so as to render the marriage voidable.
- III. What the various civil disabilities to a marriage are.
- IV. Whether or not the old ecclesiastical courts or the present Divorce Court would, on the ground of some canonical

disability, after the death of one of the married couple, declare the marriage void. (See the Commentaries, p. 239.)

- V. Whether the marriage of a lunatic which took place during a lucid interval is void or not.
- VI. Why it is that a man may marry his cousin although he cannot marry his niece.
- VII. By what mode of computation it is ascertained whether two persons are, for the purpose of intermarrying, within the prohibited degrees or not.
- VIII. Whether the prohibitions to marriage on the ground of near relationship apply to persons related by blood (*consanguinei*) only, or also to persons related by marriage (*affines*), and whether these prohibitions with regard to collaterals apply to the half as well as to the whole-blood, and whether they apply to bastards.
- IX. At what age a male and female respectively are, according to our law, able to consent to marriage. Whether a marriage contracted between persons under the lawful age is absolutely void or voidable only.
- X. A., an infant, makes a promise of marriage to B., an adult. A. refuses to carry out the promise. Whether or not B. would be able to successfully maintain an action against him.
- XI. Whether in the case last given, if B. refused to carry out the contract, an action at A.'s suit would lie.
- XII. What, in connection with marriage by registrars, the result is, if by means of a false notice, certificate, or declaration the marriage is procured, under 6 & 7 Will. 4, c. 85.
- XIII. In connection with the marriage referred to in the last head, what act amounts to a felony under the provisions of 6 & 7 Will. 4, c. 85.
- XIV. What the necessary residence in Scotland is in order to make an irregular marriage solemnized in that country good. (See 19 & 20 Vict. c. 96, cited in foot-note, p. 257 of the Commentaries.)
- XV. What the provisions of 4 Geo. 4, c. 91, 12 & 13 Vict. c. 68, 28 & 29 Vict. c. 64, relating to the marriage of British subjects abroad, are.

- XVI. On what reason the old rule excluding husbands and wives from giving evidence for or against each other in any proceedings, civil or criminal, was founded, and what the various alterations in this rule effected by statute-law are.
- XVII. Whether the ordinary rule that on marriage husband and wife become one person applies to the case of the Queen of England.
- XVIII. A wife, during coverture, becomes entitled to personal property as executrix or trustee for another person. Whether or not this property passes to her husband.
- XIX. What the protection afforded to women deserted by their husbands by the Divorce Act, 1857, is. (20 & 21 Vict. c. 85.)
- XX. How far the legal status of married women is affected by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).
- XXI. What the privileges and what the disabilities are which a woman acquires by marrying.
- XXII. In what cases it is necessary to join a husband and wife together as co-plaintiffs or co-defendants in an action, and whether the rule on the point is the same in the Courts of Law and the Courts of Equity.
- XXIII. What the meaning of the following terms respectively is:—paraphernalia, pin-money, strict settlement, ante-nuptial settlement, post-nuptial settlement.
- XXIV. What the circumstances are under which a post-nuptial settlement made by a man upon his wife and children is liable to be upset. (See 13 Eliz. c. 5, and 27 Eliz. c. 4, and sect. 91 of 32 & 33 Vict. c. 71.)
- XXV. Under what circumstances deeds of separation between husband and wife are upheld.

### Chapter III.—Of Parent and Child.

#### REMARKS.

This is by no means so important a Chapter for examination purposes as the one just finished, but at the same time you must read it very carefully, as there are several nice points in it on which the Examiners might ask questions. After telling you that children are

of two sorts—*legitimate* and *illegitimate*—the learned author of the Commentaries considers—

I. *What the duties of parents towards their children are ?*

These may be shortly stated to be :

(1) To maintain them. By the common law no means of enforcing this plain duty on the part of parents seems to have existed, but by statute parents are made liable to support their children when able to do so, and to incur penalties in default, but the liability only attaches as long as the children are unable to work, either through infancy, disease or accident.

You will remember from the Chapter on "Title by Will" that our ancient laws required a man to leave for his children a certain portion of his personal estate on his death as their *pars rationabilis*, but this duty now no longer exists, and a man may give the whole of his property away by his will, and so on his death leave his children destitute. On the death of a father the widow becomes responsible to support her children, and the Married Women's Property Act, 1870, casts this responsibility on a woman during her husband's lifetime if she has separate property (sect. 14).

(2) To educate them. This obligation, which the laws of reason and nature impose, was not enforced by our laws until 1870, but now parents are compelled by law to cause their children, between the age of five and fourteen, to attend some school as provided by the Education Acts, 1870 and 1876.

The second question considered is :—

II. *What power have parents over their children ?*

(1) The right to administer, and authorize a tutor or schoolmaster to administer, sufficient moderate chastisement to keep the child in order and obedience.

(2) The right to receive, as guardian for his child, the rents of any real property belonging to him till the child attains majority, when the father must account for what he has received.

(3) The right to the control of the person of his child. If anyone detains the child from his or her parent the latter may obtain a writ of *habeas corpus* for the delivery over of the body of the child, and moreover, the person detaining the child is liable to criminal proceedings for the detention.

(4) The right to consent or dissent to the marriage of the child.

(5) The right to appoint a guardian to his infant children unmarried after his death.

These rights of the parent cease when the child attains the age of twenty-one, the period when, according to our law, a person ceases to be an infant, and becomes, as it were, enfranchised.

The powers just mentioned belong to the father in his lifetime, and after his death to any guardians he may appoint; but, if he appoints no one, the widow, while she remains a widow, becomes the guardian, and as such possessed of the powers of the father, except the power to appoint a guardian, which can only be exercised by a father. The Chancery Division, during the mother's lifetime, has the right to order the custody of the children to remain with the mother until they attain the age of sixteen (36 Vict. c. 12); and, as you will remember from the last Chapter, when husband and wife are judicially separated, the custody of the children may be disposed of by the Divorce Court or the magistrates, as may be thought desirable. Moreover, the Chancery Division will remove children from their father's control in all cases where it is shown that he is an improper person to have the charge of them, the Court's jurisdiction being paramount to that of the father.

The third question considered is—

### III. *What are the duties of children towards their parents?*

To protect, support, and maintain them when they stand in need of protection, &c. This duty, imposed by the natural law, is enforced by certain statutory enactments relating to the poor, which require children to allow such a sum as the justices of the peace may order towards the support of their pauper parents.

You ought to find no difficulty in understanding what appears in the Commentaries respecting bastards; and I may here mention that the custody of bastard children belongs to the mother.

#### POINTS TO NOTE.

- I. Whether by our law, or by the civil and canon law, a child whose parents were not married when it was born, but who subsequently married, is a legitimate child or a bastard.
- II. What, with regard to the point appearing in the last head, the superiority of our law is over the civil and canon law.

- III. What the circumstances are under which a child born during marriage is considered by our law as a bastard.
- IV. Whether a child born after the death of the husband is considered as legitimate or bastard, and whether the distance of time after the death has any bearing on the question, and whether the question of legitimacy or otherwise is one of law or of fact.
- V. What the circumstances are under which a writ *de ventre inspiciendo* is granted.
- VI. What the inconvenient rule was which was obviated by the civil law forbidding a widow to marry within a year of her husband's death.
- VII. Whether or not a parent may justify an assault by proving that he committed it in defence of his child.
- VIII. Whether or not a person could justify the offence of maintenance by showing that the assistance lent by him in the action was lent to his child.
- IX. What offence a person commits by enticing away a young child from his or her parent. (24 & 25 Vict. c. 100, ss. 55, 56.)
- X. Who a bastard is, and what disadvantages he labours under, and by what means he can be made legitimate.
- XI. What the rights are which have been conferred on the mothers of bastards by 7 & 8 Vict. c. 101, 35 & 36 Vict. c. 65, and 36 Vict. c. 9. (See pp. 297, 298 of the Commentaries.)
- XII. To whom, on the death of a bachelor bastard intestate, his real and personal property would respectively go.

#### Chapter IV.—Guardian and Ward.

##### REMARKS.

This Chapter contains in a few pages a good deal of matter of importance for examination purposes.

The first question considered is—

##### I. *What is the legal condition of an infant?*

In other words, what acts can he perform, and what acts is he incapable of performing?

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(a) *What acts can he perform?*

- (1) He can sue by his next friend on any contract or tort.
- (2) He can, in the County Courts, sue for wages or piece-work for not more than £50, in his own name as if of full age.
- (3) He can act as the agent of another person.
- (4) He can, if the owner of an advowson, present to an ecclesiastical benefice when it becomes void.
- (5) He may give evidence on oath if old enough to sufficiently understand the nature of an oath.
- (6) He may at the age of twelve take the oath of allegiance.
- (7) He may at fourteen consent to marriage (the age for females is twelve).
- (8) He may sell or purchase lands, and either confirm or avoid the sale or purchase on his majority.
- (9) He may, with the sanction of the Chancery Division, at the age of twenty make a binding settlement on his marriage (the age for females is seventeen). (18 & 19 Vict. c. 43.)
- (10) He may, by means of his guardian, make a binding lease, or consent to a sale of a settled estate in which he is interested under the Settled Estates Act, 1877.
- (11) He may enter into a contract. Such a contract will, unless it be a contract for the loan of money or for the supply of goods (not being necessaries), bind the other contracting party; but the infant will not be bound by it unless it is a contract for his benefit, or for *necessaries* suitable to his rank in life, supplied to himself, his wife, or legitimate children. Other contracts before the Infants Relief Act, 1874, were voidable, *i. e.* the infant could ratify them on attaining his majority, and thus become bound; but the Act of 1874 particularly provides that any such ratification shall have no effect, and this whether or not there was any new consideration for it. What constitutes "*necessaries*" is a question for a jury, subject to the control of the court, to decide, and in arriving at a decision, they must take into consideration the rank and fortune of the infant.

It may be useful here to call your attention to the fact that an infant is himself personally liable for necessaries, and that except under the poor laws, to which in the last Chapter your attention was called, there is no liability on the part of the father any more than of

a mere stranger to pay for necessaries supplied to his infant child unless there is proof of some authority, express or implied, given by him to such child to pledge his credit. Such an authority would be implied as a rule if the child lived with the father.

(b) *What acts is an infant incapable of performing?*

This question is partly answered from what has been already stated; in addition an infant is incapacitated from—

- (1) Being sworn as a juror.
- (2) Holding public offices of a pecuniary trust, or of a judicial nature.
- (3) Being made a bankrupt.
- (4) Sitting and voting in parliament; and generally
- (5) Doing any legal act.

Infants are, however, liable for criminal acts committed by them, and are liable civilly for torts which are wholly unconnected with contract, *e.g.* for a libel or slander. The time allowed by the Statutes of Limitation for bringing actions does not run against infants; and, by order of the Chancery Division of the High Court, certain acts may be done by or for the infant beyond those mentioned above.

The second question considered is—

II. *What are the different kinds of guardianships existing in our law, and how do they differ?*

Guardianships are of eight kinds:—

- (1) *Guardianship by nature.*—That of the father in respect of the person of his heir apparent, *e.g.* his eldest son, or his heiress presumptive (*e.g.* his only daughter when he has no son).
- (2) *Guardianship by nurture.*—That of the father, and after his decease, of the mother, in respect of the persons of all the children, lasting to the age of fourteen.
- (3) *Guardianship in socage.*—That of the next of blood of a minor upon whom lands descend in socage. The right extends to the estate as well as to the person of the minor, and lasts till the minor attains fourteen, or fifteen in gavelkind lands.
- (4) *Guardianship by statute.*—That of the person appointed by a father by any deed or by his will over the estate and person of his infant children unmarried; this guardian, when



appointed, takes the place of the guardian in socage just referred to (12 Car. 2, c. 24).

- (5) *Guardianship by election*.—That of the person chosen by an infant after the guardianship by socage ceased, *i. e.* on his attaining the age of fourteen.
- (6) *Guardianship by appointment of the Chancery Division*.—That of the person appointed by this Division to look after the person and property of an infant; the appointment being made either because the infant has no guardian, or because the guardian he has, is not a fit and proper person to have charge of him. The Court will not usually interfere—it cannot do so usefully—unless the infant has property. The Court's jurisdiction is *paramount* to that of the father.
- (7) *Guardianship ad litem*.—That of the person appointed by a Court to defend or prosecute an action for an infant.
- (8) *Guardianship by custom*, arising in connection with either, copyholds when it belongs to the lord or to some person to whom the copyholds cannot descend, or with some local custom—*e. g.* by the custom of London, by which the guardianship of infants, children of freemen of the city of London, belongs (or rather belonged, for the custom is now not known) to the mayor and aldermen in the Court of Orphans.

The third question considered is—

### III. *What are the rights and duties of guardians?*

These rights are—

- (1) To have, as a general rule, the legal custody of his ward's person.
- (2) To have an actual estate in the ward's lands, with power to demise it, to occupy himself for his ward's benefit, and to bring actions for trespass in respect of it. If, however, he is a guardian appointed by the Court his powers are not so extensive.

His *duties* are—

- (1) To treat his ward properly.
- (2) To take care of the ward's property, and when the latter comes of age to account for all transactions effected by him, and

of all profits, if any, made, and to make good any loss sustained by his negligence.

A guardian who neglects his duties is liable to proceedings in equity, at the suit of the ward, either during or after the latter's minority.

POINTS TO NOTE.

- I. Up to what age it is that a person is considered by our laws as an infant.
- II. Whether or not an infant can sue or be sued in a court of justice, and if so by what means.
- III. Whether or not a mother may appoint by deed or will a guardian to her infant children, or whether she may be appointed guardian.
- IV. What the course to be adopted is, when lands which it is necessary to convey are vested in an infant trustee or mortgagee. (13 & 14 Vict. c. 60, ss. 7, 20.)
- V. An infant after majority promises in writing to pay a debt contracted during infancy. Whether or not such promise will now bind, or would ever have bound, him, and what the statute bearing on the point is.
- VI. An infant makes a lease, and after majority accepts rent. Whether or not he can then dispute the validity of the lease.
- VII. An infant contracts to sell a horse and gives a warranty that the horse is sound. The horse proving unsound, whether or not an action would lie against the infant for the tort.
- VIII. On what principle it is that an infant is liable *for necessities*, and what the term "necessaries" includes.
- IX. Whether a widow, who is an infant, would be responsible for expenses incurred in burying her husband.
- X. Under what circumstances the Court will order infants to be removed from the custody of their guardian.
- XI. To whom the custody of an infant bastard's person belongs.
- XII. What the circumstances are under which a mother can obtain the custody of her infant children.
- XIII. How far the provisions of the Conveyancing Act, 1881, affect infants.

## TEST PAPER TO WORK OUT.

1. What constitutes a "trader" within the meaning of the Bankruptcy Act, 1869?
2. What risk does a trustee in bankruptcy run by keeping large sums of money belonging to the bankrupt's estate on his hands for a length of time?
3. Who is an executor *de son tort*?
4. Mention every distinction you can think of between executors' and administrators' duties.
5. A man dies intestate. His relations are a widow, a father and a mother. How will his personal estate be divided?
6. Under what circumstances do the nephews and nieces of an intestate take *per stirpes*, and when *per capita*?
7. Distinguish a *post-nuptial* from an *ante-nuptial* settlement.
8. What are the rights of the husband in the following properties of the wife:—(1) Her freehold estate, (2) her leasehold property, (3) her chattels personal, some in possession, others in action?

## Eighth Week's Work.

Analyse the following statutes in your MS. book:—

- 21 Jac. 1, c. 3 (*The Statute of Monopolies*).  
 22 & 23 Chas. 2, c. 10 and 1 Jac. 2, c. 17 (*The Statutes of Distribution*).—These statutes regulate the devolution of the personal estate of an intestate. The provisions are difficult, and to assist I append a table in illustration of the rules.

TABLE showing how the PERSONAL ESTATE of an INTESTATE devolves under the STATUTES OF DISTRIBUTION (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17).

Relations of Intestate living at his Death.	The Shares in which his Representatives take.
(1) Wife and children (sons and daughters).	One-third to wife, rest to children equally. [N.B.—If any child has been advanced by the father in his lifetime, the sums advanced must be accounted for, or, as it is called, brought into <i>hotchpot</i> ; but the widow does not derive any benefit from this accounting, i. e. she takes her third of what is left by the intestate, and then on dividing the shares of the children the sums received by any of them must be accounted for.]

TABLE UNDER STATUTES OF DISTRIBUTION, &c.—*continued*.

Relations of Intestate living at his Death.	The Shares in which his Representatives take.
(2) Wife, two daughters, and two grand-daughters, the children of a deceased daughter.	One-third to wife and the rest divided into three equal parts, each of the daughters taking one-third and the other third being divided equally between the granddaughters, they taking the share their mother would have taken had she been alive. [Note.—The daughters in this case take in their own right, or <i>per capita</i> , and the granddaughters in right of their mother, or <i>per stirpes</i> .]
(3) Wife (no children or issue of children), father, mother, brother and sister.	One-half to wife and the other half to the father. [N.B.—If there are no children the widow always takes one-half. After the children the father takes to the exclusion of the mother, brothers and sisters.]
(4) Children, or children and grand-children, father and mother (no widow).	All to the children and grandchildren, the latter only taking their deceased parent's share.
(5) Father, mother, brother and sister (no widow or children).	Whole to father.
(6) Mother, brother and sister, and two nephews, issue of a deceased brother (relations of the whole blood), and a brother of the half-blood.	The property will be divided into five equal shares. Mother, brother and sister of the whole blood and brother of the half-blood will take one share each, and the nephews will take the deceased brother's share between them. [N.B.—Half-blood share equally with the whole blood in personalty.]
(7) Mother (or brother) and grandfather	Whole to mother (or brother).
(8) Mother, and three grand-nephews, the issue of a deceased brother.	All to the mother. [N.B.—Representation among collaterals is not allowed after brothers' and sisters' children, i. e. grand-nephews and grand-nieces cannot stand in the place of the intestate's brothers and sisters deceased.]
(9) Two nephews, children of a deceased sister, and three nieces, children of a deceased brother, and a nephew, issue of another deceased sister.	The property will be divided into six equal shares, each nephew and niece taking one share. [N.B.—The nephews and nieces here take <i>per capita</i> , there being no mother or brother and sister of the intestate living to share with them. Had there been, then they would have taken <i>per stirpes</i> , i. e. their deceased parents' share only.]
(10) Grandmother, uncle and aunt ....	The whole to grandmother.
(11) Husband, children and father ....	All to husband.
(12) Wife and no other relations whatever	Half to wife, rest to Crown.
(13) Uncle and child of deceased uncle..	All to uncle.
(14) Grandfather (on father's side) and grandmother (on mother's side).	Equally to both.
(15) Two aunts and two uncles .....	Equally to all.

- 29 *Chas. 2, c. 3 (The Statute of Frauds)*, ss. 4, 17, should be known perfectly.
- 4 *Geo. 4, c. 83*; 6 *Geo. 4, c. 94*; 5 & 6 *Vict. c. 39*; 40 & 41 *Vict. c. 39 (The Factors Acts)*.—Purchasers and pledgees from factors obtain a good title if *bonâ fide*, although the factor acted without authority.
- 1 *Will. 4, c. 40*.—Executors not entitled to undisposed-of residue of personal estate.
- 7 *Will. 4 & 1 Vict. c. 26 (The Wills Act)*.
- 17 & 18 *Vict. c. 90 (Usury Laws Abolition Act)*.
- 20 & 21 *Vict. c. 57 (Malins' Act)*.—Married women by deed acknowledged can assign their reversionary interest in personal property.
- 20 & 21 *Vict. c. 77 (Probate Act)*.—Court of Probate established.
- 20 & 21 *Vict. c. 85 (Divorce Act)*.—Court of Divorce established.
- 24 & 25 *Vict. c. 114 (Kingsdown's Act)*.—Wills of British subjects domiciled abroad are admitted to probate, so as to pass personalty here if executed according to the law of (1) the place where domiciled, or (2) the place of original domicile, or (3) the place where will made.
- 26 & 27 *Vict. c. 41 (The Innkeepers Act)*.—Innkeepers' liability in respect of guest's goods cut down to 30*l.*, except, &c.
- 28 & 29 *Vict. c. 86 (The Partnership Amendment Act)*.—In certain cases (note them carefully) a person may share profits without incurring the liability of a partner.
- 30 & 31 *Vict. c. 48 (Sales by Auction Act)*.—Puffers at sales not allowed. Biddings at sale cannot be opened.
- 32 & 33 *Vict. c. 46 (Hinde Palmer's Act)*.—Priority of specialty creditors over simple contract creditors abolished.
- 33 & 34 *Vict. c. 93 (The Married Women's Property Act)*.—A very important statute (*inter alia*) allowing a married woman to hold for her separate use as a *feme sole*, and as such to sue for the same—(a) Earnings acquired by the exercise of her brains or hands; (b) Deposits in savings banks, public stock, shares in joint stock companies to which no liability attaches, and interests in friendly and similar societies; (c) Personal property, including leaseholds coming to her under an intestacy, *whatever the amount*, and gifts by deed or will of sums of money *not exceeding 200*l.**; (d) The rents and profits of real property descending to her as

heiress. While the statute gives these rights, it imposes on a married woman the liability to support her pauper husband and her children out of her separate estate.

The statute took away the husband's liability for his wife's ante-nuptial debts, but this was altered by the Married Women's Property Amendment Act, 1874, which made the husband responsible—if married since 30th July, 1874, for both ante-nuptial debts and torts to the extent of the assets which he received or might have received with his wife.

- 37 & 38 *Vict. c. 62 (The Infants' Relief Act, 1874)*.—This important act makes a material alteration in the law relating to infants' contracts, by providing in effect that all contracts by infants for money lent and goods supplied, except necessities, are void *ab initio* as regards both parties, and other contracts are absolutely void as against the infant, even though he ratify them after attaining his majority, although he has still the right to sue upon them. The object of the act is to protect young men from being imposed upon by money-lenders who were willing to advance infants money at exorbitant rates of interest, relying on the infant ratifying the contract when he attained majority, and thus becoming liable to repay the loan just as if at the time of its being effected the infant had been of full age.
- 39 & 40 *Vict. c. 81 (The Crossed Cheque Act)*.—Cheques may be crossed generally or specially, and the words "not negotiable" may be added.
- 41 *Vict. c. 19 (The Matrimonial Causes Act)*.—A magistrate may decree a judicial separation in cases where a husband is convicted of an aggravated assault on his wife, and may order him to pay alimony, and to allow the wife the custody of the children up to ten years of age.
- 41 & 42 *Vict. c. 31 (Bills of Sale Act)*.—Bills of sale must be attested by a solicitor, the attestation stating that the bill was explained to the grantor, and must be registered in Queen's Bench within seven days and re-registered every five years; otherwise, if the grantor remains in possession of the goods the bill of sale is void against (1) the trustee in bankruptcy of the grantor, (2) his execution creditors, (3) his subsequent assignee of the same property who has registered.

- 41 & 42 *Vict. c. 38 (The Innkeepers Act)*.—An innkeeper may after six weeks sell his guest's goods, but he must give notice in the papers that he is going to sell one month at least before sale.
- 43 & 44 *Vict. c. 47 (The Ground Game Act)*.—Tenants can shoot hares and rabbits on their lands notwithstanding any agreement to the contrary.
- 43 & 44 *Vict. c. 42 (The Employers' Liability Act)* shows when a master is liable for the acts of his servant whereby another is injured.

### Ninth Week's Work.

Revise Volume I.

During this week go through each Chapter in this Guide, turning to the text-book only when you are in doubt or difficulty; also go through any notes you may have made on Volume I. and your analysis of statutes on that Volume. Pay special attention to any particular Chapters upon which you feel yourself weak. At the end of the week work out the following test paper.

#### TEST PAPER TO WORK OUT.

1. How are the various "Rights," which are enforced by our laws, divided?
2. A man being in prison executes a deed, can he avoid the same?
3. Lands by deed in one case and by will in another are conveyed to A. and his heirs male. What estate does A. take in either case?
4. Lands are limited to A. for ninety-nine years with remainder to B.'s son unborn. Is such a remainder good? Give your reason.
5. For what period can the income of property be accumulated? What act governs the question?
6. In what ways can a joint tenancy be severed?
7. In what three ways, prior to the Statute of Uses, could uses be created?
8. Lands are limited to A. for life, with remainder to B. in tail. A. sells his life interest to C. B. wishes to bar the entail, and obtains a fee simple absolute. Whose consent must he obtain? A.'s or C.'s, and why?

(For the *Tenth Week's Work*, see *post*, p. 212.)

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## BOOK IV.—OF PUBLIC RIGHTS.

This Book, which extends over the latter half of Volume II. and the first part of Volume III. of the Commentaries, is excluded from the subjects for the Intermediate Examinations during 1882, and will probably continue to be excluded in future years.

As, however, some of the subjects are important for the Final, we deem it desirable to treat slightly on them.

## BOOK IV., PART I.—OF THE CIVIL GOVERNMENT.

CHAPTER I.—*Of the Parliament.*

- „ II.—*Of the Sovereign.*
- „ III.—*Of the Royal Title.*
- „ IV.—*Of the Royal Family.*
- „ V.—*Of the Royal Council.*
- „ VI.—*Of the Royal Prerogative.*
- „ VII.—*Of the Royal Revenue.*
- „ VIII.—*Of the Royal Forces.*
- „ IX.—*Of the Nobility and other Ranks.*
- „ X.—*Of the Magistrates and other Public Officers.*

} All these Chapters, except the last,  
are practically unimportant.

## Chapter X.—Of Magistrates and other Public Officers.

## REMARKS.

This Chapter is a somewhat more important one than any of the previous Chapters of this Book. After giving some general interesting account of “officers,” the Chapter considers particularly the following officers:—

I. *Sheriffs*—officers of great antiquity—who are, under the present practice assigned by the chancellor, the treasurer and the judges, who meet on the morrow of St. Martin, in the Exchequer, and report to the Sovereign three eligible persons for each county, out of whom the Sovereign appoints (*pricks*) one to be sheriff for the ensuing year. The sheriff’s duties are (*inter alia*) as follows :

- (1) To assist at parliamentary elections, to hold county courts for the election of coroners, for proclaiming outlawries, &c.



- (2) To apprehend breakers of the peace, to pursue and take all traitors, murderers and felons, to defend his county against the Queen's enemies, and for any of these purposes to command the people of his county to attend him (this last is called the *posse comitatus*, or power of the county). In exercising these duties the sheriff acts as "keeper of the Queen's peace," and as first man (nobility included) of his county.
- (3) To execute process from the superior courts of justice, to attend the judges on assize, to summon juries either for civil or criminal purposes, and to carry out a sentence of death in his county; but beyond this the sheriff has no jurisdiction or responsibility in criminal matters. These duties are performed by the sheriff in his ministerial capacity.
- (4) To preserve the rights of the Crown in his bailiwick (or county) by seizing for his sovereign's use all lands escheated, all waifs, estrays, wrecks and the like, and by levying all fines and forfeitures. These duties he performs in his character of the "Queen's Bailiff."
- (5) To nominate within a month of his appointment being gazetted some fit person to be his under-sheriff, on whom the main duties of the sheriff devolve.

Other officers of the sheriff are—

- (a) Bailiffs, to summon juries, collect fines, execute writs and processes.
- (b) Gaolers, to keep safely all such persons as are committed to them by lawful warrant.

II. *Coroners.* An office of equal antiquity with that of the sheriff, deriving its name because the coroner (or *coronator*) has principally to do with the pleas of the Crown. The chief coroner, with power to act in any part of the realm, is the Lord Chief Justice of England. Other coroners are chosen by the freeholders of each county (or by the town council of boroughs in which Quarter Sessions are held), and his office lasts for his life, unless he be subsequently made sheriff (for then he can no longer hold the coronership), or misbehave himself in office. His office and powers (*inter alia*) are:—

- (1) To inquire the cause and manner of death of any person dying suddenly or in prison, or being slain within the jurisdic-

tion of his coronership. This inquiry must be *super visum corporis* (for if the body cannot be found the coroner cannot sit), with a jury of twelve at least. He may require medical men and assessors to attend the inquiry, and order a *post mortem* examination of the body. He must commit to prison for further trial any person against whom the jury return a verdict of homicide.

- (2) To inquire concerning shipwrecks and treasure trove.
- (3) As a magistrate and conservator of the king's peace, to apprehend felons.
- (4) To act as the sheriff's substitute in executing process in any case in which just exception can be taken to the sheriff's acting.

The first three powers are of a judicial nature, while the last is of a ministerial nature only.

III. *The Justices of the Peace.* Persons appointed by commissions under the Great Seal to keep the Queen's peace within a particular county or borough. Justices of the peace for the county should be men of the best reputation, and must have the necessary qualification, which, under an act passed in 1875 (38 & 39 Vict. c. 54), may consist of the occupation for two years of a house assessed to the inhabited house duty at a value of 100*l.*, and rated to the rates and taxes in respect thereof, thus doing away with the restrictions of 18 Geo. II. c. 20, which required all persons appointed as justices of the peace to hold lands of the annual value of 100*l.*

The office of justice of the peace determines :—

- (a) By demise of the Crown.
- (b) By express writ under the Great Seal discharging the justice.
- (c) By writ of *supersedeas*. This, however, only suspends the office, and it may be revived again by a writ of *procedendo*.
- (d) By a new commission.
- (e) By accession to the office of shrievalty.
- (f) By becoming bankrupt.

The duties and powers of a justice of the peace are various, and are regulated by his commission and by statute law. They sit at *Quarter Sessions* for determining felonies (except those of a deeper dye, which can only be tried at assizes) and misdemeanors; at *Special*

*Sessions*, for licensing alehouses, appointing overseers of the poor, &c.; and at *Petty Sessions*, to try in a summary way without a jury certain offences set out in different statutes, and this jurisdiction has been considerably extended by the Summary Jurisdiction Act, 1879, which came into force on 1st January, 1880. A justice of the peace is liable to be sued for injuries sustained by acts of an illegal nature done by him in his office, but the action must be brought within six months (or three months if a stipendiary magistrate), and one month's notice of intention to bring it must be given to the justices, and if a justice of the peace is guilty of malicious abuse in his office he subjects himself to criminal liability.

IV. *Constables*, of whom there are two sorts—(a) *high constables*, and (b) *petty constables*.

Their duties are to keep the peace in their several districts, and to enable them to do this they are armed with considerable powers, the extent of which would probably astonish the petty constables, did they know of what they consisted. There are also *special constables*, *i. e.* persons sworn in by justices to quell existing, or to prevent apprehended, disturbances.

#### POINTS TO NOTE.

- I. What the meaning of the following terms are :—(a) Pocket sheriff; (b) bound bailiffs; (c) special bailiffs.
- II. Whether or not a coroner can, for all, or any, and what purposes, appoint a *deputy*.
- III. Whether or not the verdict of a coroner's jury must be the unanimous verdict of the whole jury.
- IV. Whether a coroner can admit to bail a man against whom a verdict of murder or manslaughter has been found.
- V. How the present and former modes of burying a person found guilty of *felo de se* (suicide) differ.
- VI. Who *stipendiary* magistrates are, and by what statute first created.
- VII. In connection with the law of constables, what you know about *watchmen* and *inspectors*.
- VIII. In connection with the office of *high constable*, what is meant by "keeping *ward and watch* within his jurisdiction."

## PART II., CHAPTERS I.—IV.—OF THE CHURCH.

## CHAPTER I.—Of the Ecclesiastical Authorities.

- „ II.—Of the Doctrines and Worship of the Church.  
 „ III.—Of the Endowments and Provisions of the Church.  
 „ IV.—Of New Ecclesiastical Districts and other Extensions of the Original Church Establishment.

## Chapter I.—Of the Ecclesiastical Authorities.

The people of England are divided into two great classes, the *clergy* and the *laity*, and the sovereign is the head of the clergy as of the laity. All ecclesiastical authorities under the Queen are known by the general term *clergy*, a body of men set apart from the rest of the people to attend more closely the services of Almighty God.

Most of the ancient privileges of the clergy have been swept away, but they still possess some personal exemptions. Thus—

- (a) They cannot be compelled to serve on a jury, to attend a court leet, or view a frankpledge.
- (b) They cannot be chosen for any temporal office, *e.g.*, bailiff, sheriff, constable.
- (c) They cannot be arrested while performing divine service, or on their way to or from performing such service.

The disabilities of the clergy are (*inter alia*):—

- (a) They cannot sit in the House of Commons.
- (b) They cannot be councillors or aldermen in boroughs.
- (c) They cannot farm more than eighty acres of land.
- (d) They cannot trade except in partnership, when the trade must be carried on by the other partners, and there must be more than six partners in the business.

[N.B.—They may be schoolmasters and directors, and partners in benefit and insurance societies.]

The clergy consist of the following persons:—

- I. *Archbishops*, who are elected by the chapters of their cathedral church by virtue of a licence from the Crown.

The following are some of the chief points to remember in connection with *archbishops*, of whom there are two, viz., the Archbishop of Canterbury and the Archbishop of York:—

- (a) An archbishop is the head of the clergy in his province, and has the right to inspect or *visit* the bishops and inferior clergy within that province.
- (b) On receipt of writ from the Sovereign for the purpose, he calls together the bishops and clergy in *convocation*.
- (c) He is guardian of the spiritualities of any vacant see in his province.
- (d) He is entitled to present by lapse to ecclesiastical livings in the disposal of his bishops if they remain unfilled for six months.
- (e) He formerly had the prerogative to name a clerk of his own to be provided for by a bishop whom he consecrates.
- (f) He has the power to grant *dispensations*, *e. g.* to allow a marriage to take place at places and times other than those allowed by law.
- (g) The Archbishop of Canterbury has the privilege of crowning the sovereigns of England.

II. *Bishops*, who are elected in the same way as archbishops. There are several bishops, each of whom is the chief in his diocese.

The powers and duties of a bishop (*inter alia*) are :—

- (a) To ordain priests and deacons.  
(N.B.—No one under twenty-four is eligible for ordination as priest, nor under twenty-three as deacon. On ordination, the candidate must (i) make and subscribe a declaration of *assent* to the Thirty-nine Articles of Religion, the Book of Common Prayer and the Ordination Service; (ii) take the oath of allegiance and supremacy to the Queen, and of canonical obedience to his bishop; (iii) produce a *title*, *i. e.* a presentation, to some ecclesiastical living within the diocese; (iv) take an oath that he has not committed simony.)
- (b) To consecrate churches.
- (c) To inspect the manners of the people and clergy, and for this purpose to *visit* every part of his diocese.
- (d) To institute and direct inductions to all livings in his diocese.
- (e) To license perpetual curacies.
- (f) To license temporary curacies within his diocese and regulate their salaries.

(g) To receive complaints or representations made respecting the clergy in his diocese under the Public Worship Regulation Act, 1874, and deal with the complaint as directed by the Act.

(N.B.—This Act was passed to supersede to some extent the proceedings under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), which were found to be cumbrous, dilatory, and expensive.)

(h) To execute writs of sequestration of the profits of benefices in his diocese issued by the Superior Courts, and to direct what part of such profits may be applied for payment of the debts of a bankrupt clergyman.

III. *Deans and Chapters*, who form the council of the bishop to assist him with their advice in matters of religion as well as in the temporal concerns of his see.

Deans are now appointed by letters patent from the Crown.

Chapters, consisting of canons or prebendaries, are sometimes appointed by the Crown, sometimes by the bishop, and are sometimes elected by each other.

IV. *Archdeacons*, who have an ecclesiastical authority under the bishop either throughout the whole or part of the diocese, with power to *visit*.

V. *Rural Deans*.—These ecclesiastical officers have now to a great extent fallen out of use. They seem originally to have been appointed as deputies of the bishop, and planted by him in different parts of his diocese for the following purposes:—  
(a) To inspect the conduct of the parochial clergy, (b) to inquire into and report dilapidations, (c) to examine candidates for confirmation.

VI. *Parsons of churches*. A parson is one in full possession of all the rights of a parochial church. He is styled a *Rector* if the living has never been appropriated, and a *Vicar* if the living has been appropriated.

In connection with rectors and vicars it is useful to remember—

(a) In unappropriated livings there is a Rector only; he must be a spiritual man, and has the cure of souls within the parish.

(b) In appropriated livings there is a *vicar* as well as a *rector*, and

the rector in this case may be a layman, and he has not the cure of souls within the parish, for this cure is committed to the *vicar*, who must be a spiritual person.

(c) In unappropriated livings the rector is seised of the freehold in the church, churchyard and the glebe, while in appropriated livings the seisin is in the vicar.

(d) In unappropriated livings the rector takes all the emoluments of the living, while in appropriated livings the greater portion belongs to him, for he takes the great (or *predial*) tithes (*i. e.* the tithes in corn), and the vicar takes the small (or the *mixed* and *personal*) tithes.

(e) A vicar is so called because he acts *vice* (instead of) the rector.

(f) By a late statute (31 & 32 Vict. c. 117) *perpetual curates* (*i. e.* persons appointed to perform spiritual duties in appropriated livings in which no vicarage had been endowed) are now considered as *vicars*.

(g) Rectories and vicarages are included in the general term *benefice*.

The person entitled to present to benefices when they fall vacant—*i. e.* the owner of the advowson to the living, or as he is called, the *patron*—*presents* or offers a person in holy orders (or a *clerk*, as he is called) to the bishop to be instituted to the living. The bishop may refuse him for good grounds (*e. g.* immoral character, heresy, want of learning); but, in the absence of such refusal, the bishop admits the patron's presentation, and *institutes* the clerk to the living. The possession of the church is then given to the clerk by his tolling a bell, or his holding the ring of the door of the church, and this must be followed by the clerk's publicly reading, on the first Lord's Day in which he officiates in the church, the Thirty-Nine Articles, and repeating his declaration of assent thereto.

These forms of *presentation* to the bishop, *institution* by him of the clerk to the spiritualities, and *induction* by him of the clerk into (*i. e.* investing him with) the temporalities or profits, of the benefice, are the forms gone through when the advowson is of the usual kind, *viz. presentative*. When, however, it is *collative*, *i. e.* when the bishop is the patron, presentation is not necessary; and the institution is called a *collation*, and is followed by induction.

If the advowson is *donative*, *i. e.* if it is of a church or chapel which is not subject to visitation by the bishop, the clerk obtains possession of the church by the patron's deed of donation alone, without pre-

sentation, institution or induction ; in short, the bishop has no voice in completing the clerk's title.

One of the chief duties of a parson being to superintend the public worship in his parish, perform ceremonies and administer spiritual counsel and advice, in order that he may constantly be in readiness to perform these duties whenever occasion arises, he is required to *reside* within his parish,—hence he is called an *incumbent*. (You must carefully notice the exceptions to this rule of *residence* given in the *Commentaries*, pp. 690, 691.)

A parson may cease to be so in various ways, viz. :—

- (a) By death ; (b) by cession on taking another benefice ; (c) by deprivation for proper cause ; (d) by consecration (*i. e.* becoming a bishop) ; (e) by resigning the benefice into the bishop's hands.

VII. *Curates*, or clerks in holy orders, employed by the rector, vicar, or other incumbent of a living to serve in his absence, or as his constant assistant.

Curates may be appointed by the bishop in cases where there is no resident incumbent, or where he thinks the duties are inadequately performed, with a stipend of not less than 80%, or of the annual value of the benefice itself, if it is less than that sum.

Other officers connected with the church are :—

VIII. *Churchwardens*.—Lay persons, who are the guardians of the church, and represent the body of the parish.

They are appointed sometimes by the parish, sometimes by the incumbent, and sometimes by both, as custom directs. Some of their duties are—

- (a) To repair the church, and to make rates for the purpose ; these rates, however, are now voluntary.
- (b) To regulate the right to unappropriated sittings in church and chancel, subject to directions from the bishop.
- (c) To enforce proper behaviour during divine service.
- (d) To preserve the goods of the church.
- (e) To render a proper account of their receipts and payments at the end of the year.



IX. *Parish Clerks and Sextons*, both of whom hold the office for their lives.

The qualification for the office of parish clerk are—

- (a) He must be twenty years of age, (b) known to the incumbent to be of honest conversation, (c) sufficient for his office.

The sexton's duties are—

- (a) To clean the church, (b) to open the pews, (c) to dig graves for the dead, (d) to provide necessaries for the church, (e) to prevent disturbances in the church.

#### POINTS TO NOTE.

- I. What the history is relating to the election of archbishops and bishops.
- II. What the meaning of the following terms respectively is—  
(a) *Ordination*, (b) *suffragan bishops*, (c) *rector sinecure*, (d) *holding in commendam*.
- III. How the following persons may cease to hold their office—  
(a) Bishops, (b) archdeacons, (c) deans.
- IV. By whom the following persons are appointed—  
(a) Churchwardens, (b) parish clerks, (c) sextons.
- V. What effect is produced on an advowson *donative* by the patron presenting a clerk to the bishop for the latter's institution to the living.
- VI. What the history connected with the origin of vicars is.

#### Chapter II.—Of the Doctrines and Worship of the Church, and herein of the Laws of Heresy and Nonconformity.

##### REMARKS.

In connection with this Chapter, you must carefully notice the provisions of the following acts of parliament:—

1 *Eliz. c. 1 (Act of Supremacy)*.—Establishing the supremacy of the crown in church matters.

1 *Eliz. c. 2, s. 14*.—Imposing a penalty of 12*d.* to be levied by churchwardens for the use of the poor of the parish from those persons who failed to attend their parish church on Sundays and holidays. (This act was repealed by 9 & 10 Vict. c. 59.)

13 & 14 *Car. 2, c. 4 (The Act of Uniformity)*.—Requiring (i) the Book of Common Prayer to be used in every place of public worship ; (ii) every teacher of youth to make a written declaration to conform to the Liturgy, and to obtain a licence from the bishop to preach.

22 *Car. 2, c. 1 (The Conventicle Act)*.—Subjecting persons more than five in number (not being members of the same family) who assembled together for religious exercise not in conformity with the Liturgy of the Church of England, to certain penalties.

1 *Wm. & Mary, st. 1, c. 18 (Toleration Act)*.—Allowing persons freely to meet together for religious services conducted in their own way, subject to certain conditions.

19 *Geo. 3, c. 44* ; 52 *Geo. 3, c. 155* ; 53 *Geo. 3, c. 160*.—In effect removing all conditions imposed by former statutes on dissenters.

18 *Geo. 3, c. 60* ; 31 *Geo. 3, c. 32* ; 43 *Geo. 3, c. 30* ; 10 *Geo. 4, c. 7* ; 2 & 3 *Wm. 4, c. 115* ; 7 & 8 *Vict. c. 102* ; 9 & 10 *Vict. c. 59*.—Removing the penalties and disabilities under which Roman Catholics were subject with regard to holding religious services and exercising civil rights.

By virtue of these and other acts, people in England have a right to free opinion and discussion on religious subjects, their worship is protected from interruption, and their religious belief, whatever it may be, is no bar to their holding public offices, except that Roman Catholics and Jews are prevented from holding the following offices :—

- (a) Guardian or regent of the kingdom.
- (b) Lord chancellor.
- (c) Lord lieutenant of Ireland.
- (d) High commissioner of the Church of Scotland.
- (e) Any office in (1) the Church of England or Scotland, (2) ecclesiastical courts, or (3) the universities, colleges, or public schools of the kingdom.

Lastly, it may be mentioned that neither a Jew or Roman Catholic can present to a vacant ecclesiastical benefice.

### Chapter III.—Of the Endowments and Provisions of the Church.

#### REMARKS.

The main subjects for your particular notice in this Chapter are :—

I. Advowson. II. Simony. III. Tithes.

I. The following are some of the leading points in connection with *Advowsons* to remember :—

- (a) An advowson is a species of incorporeal hereditament, and may be defined as the perpetual right of presentation to a rectory, vicarage, or other ecclesiastical benefice.
- (b) He who owns the advowson, *i. e.* he who has the right to present is called the *patron*.
- (c) Advowsons are *appendant* when they are annexed to a manor, and *in gross* when they have been separated from the manor to which they were originally attached.
- (d) The patron may sell the next presentation or several presentations, retaining the advowson, and the purchaser becomes the patron in respect of the presentation bought.
- (e) The right of presentation must be exercised with diligence, and if the patron omits to present within six months of a vacancy occurring, the right lapses to the bishop; if the bishop neglect, the right lapses to the archbishop; and if the archbishop fails to present in the proper time, the right lapses to the Crown. You must notice carefully what appears in the Commentaries concerning this important law of *lapse*.
- (f) In presenting, the patron must not commit the offence of simony. This brings us to the second head.

II. *Simony*, an offence which consists of the corrupt presentation of a person to an ecclesiastical benefice for money, gift, or reward. If simony is committed, in addition to other penalties, the right to present lapses to the Crown; but the law has in modern days created so many exceptions to the old stringent rules relating to simony, that the forfeiture incurred by this offence may be evaded. The offence is still, however, committed in the following cases :—

- (a) A purchase of the next presentation when the living is vacant.
  - (b) A purchase of the next presentation by a clerk (clergyman) with a view of presenting himself—this, whether at the time of purchase the living is full or vacant.
  - (c) Presenting a clerk under an agreement or undertaking by him to resign otherwise than as allowed by 9 Geo. 4, c. 94.
- (N.B.—This statute makes good such agreements if in

favour of any one person named, or one of two, each being by blood or marriage a *b-rother*, *u-nole*, *n-ephew*, *g-rand-nephew*, *g-randson* or *s-on* of the patron, or one of the patrons (the initial letters, you will observe, spell “bungs” with double “g”).)

- (d) Purchasing a living when the incumbent is *in extremis*, with the view of presenting the particular clerk, who is subsequently presented, especially if that clerk is privy to the purchase.

The following acts do *not* constitute *simony*.

- (a) The purchase of an *advowson*, whether the living is full or vacant.
- (b) The purchase of a next presentation (by any one except a clerk who has a view of presenting himself) when the living is full.
- (c) Presenting subject to agreement to resign coming within 9 Geo. 4, c. 94.

III. *Tithes*. Another species of incorporeal hereditaments, consisting of “the right to one tenth part of the produce of land or work.” They are *prædial*, when derived from the direct produce of land, as corn, hops, grass; *mixed*, when derived from stock upon land, as wool and milk; and *personal*, when derived from personal industry, as wages.

At the present time tithes are payable to the rector of the parish, whether incumbent or lay owner (although, if lay owner, a portion of them, known as the *vicarial*, or *small* tithes, are generally paid to the vicar).

Persons exempt from paying tithes are (1) the Sovereign, (2) spiritual corporations and persons succeeding them in their title.

Exemption from tithes may also be claimed by reason of the following causes, namely:—

- (a) Where a *real composition* has been made in substitution for them.
- (b) Where by custom a *modus* from time immemorial in lieu of them (wholly or partially) has been taken, *e.g.* a custom that the rector have every twelfth cock of hay, instead of the every tenth, in consideration of the owner’s making it for him. In order that a *modus* may be good and sufficient

it must (*inter alia*) be (i.) certain and invariable; (ii.) of a nature beneficial to the rector; (iii.) of a nature different from the thing compounded for; (iv.) not too large, or a *rank modus*, as it is called.

- (c) From long usage or prescription, *i. e.* thirty years if the tithes belong to a lay rector or corporation aggregate, and sixty-three years if to an ecclesiastical corporation sole.

Tithes are rarely now met with, as they have been commuted into money payments by the Tithes Commutation Act, 1836 (6 & 7 Will. 4, c. 71), the payments being calculated upon the average value of the price of corn during the seven previous years and charged upon the land as rent-charges. This commutation is arrived at either (1) by a voluntary parochial agreement entered into by a certain proportion of the persons interested, and confirmed by the tithe commissioners, or (2) by compulsory award by these commissioners.

Other revenues of the clergy mentioned in the Commentaries are :

(1) *Surplice fees*, *i. e.* fees payable to the incumbent on burials, marriages, and the like, not however due as of common right, but depending on custom only.

(2) *Easter offerings*, *i. e.* offerings of 2d. per head from all the parishioners of the age of sixteen or upwards to the incumbent of the parish. These offerings are due of common right, and are expressly recognized by statute, and means provided for their recovery before justices of the peace if they do not exceed 10l. (or 50l. in the case of Quakers), and in other cases in the Superior Courts.

(3) *Mortuaries*. A species of *ecclesiastical heriots*, being a customary gift of the second-best chattel claimed by and due to the incumbent in many parishes on the death of a parishioner, as a recompense of his personal tithes and offerings not duly paid in his lifetime. Mortuaries are not due by law but by custom, and originally seem to have been a voluntary donation brought with the corpse when it came to be buried, thence called a *corse-present*. In Henry III.'s reign the right to mortuaries became established, and a bequest of them was a necessary ingredient to every will of personal chattels.

The right to mortuaries depending on custom alone, and there being a variety of customs relating to them, many frauds and much litigation in consequence arose, and to reduce mortuaries to some sort of certainty, a statute was passed in Henry VIII.'s reign (21 Hen. 8,

c. 6), the provisions of which as set out in the Commentaries you must carefully notice, for by this statute the law of mortuaries is still governed.

#### POINTS TO NOTE.

- I. Whether or not a rector of a parish is bound to (a) repair (i) the body of the church, (ii) the chancel, (iii) the parsonage house and buildings; (b) cultivate the glebe lands in a husbandlike manner; and whether the duties of a vicar in these matters are the same as of a rector.
- II. What the following terms mean :  
 (a) *Dilapidations*, (b) *claiming a pew by faculty*, (c) the *infeudation* of tithes, (d) the *arbitrary consecration* of tithes, (e) *oblations*.
- III. What persons cannot exercise the right of presenting to ecclesiastical benefices.
- IV. To whom originally all advowsons belonged.
- V. In connection with advowsons and the law of lapse, what the meaning of the maxim *nullum tempus occurrit regi* is.
- VI. How it happened that tithes were in some parishes divided into *great* and *small* tithes.
- VII. Whether or not the rent-charge substituted for tithes deprives the incumbent of his right to established mortuaries or surplice fees.
- VIII. Why it is that in conveying lands to a dean and chapter, or to a bishop, or to a rector, the words of limitation used should be *successors* and not *heirs*.
- IX. Whether such a conveyance could be made as of right, or whether any and what licence would be necessary.
- X. Whether or not ecclesiastical persons could at common law or can by statute make leases of their lands, and what the provisions on the subject contained in 23 & 24 Vict. c. 124, and 24 & 25 Vict. c. 105, are.
- XI. What curious mortuary was formerly payable to the bishop on the death of a clergyman within the archdeaconry of Chester, and when this mortuary was abolished.

- XII. Whether the mortuary due from a wayfaring man is payable to the incumbent of the parish in which he dies, or of the parish in which he resided.

**Chapter IV.—Of the New Ecclesiastical Districts and Parishes and other Extensions of the Original Church Establishment.**

**REMARKS.**

This cannot be considered as an important Chapter for your purposes, although you will probably find it interesting to learn by what authority, by what means, and under whose superintendence it is that numerous churches have been lately erected and endowed, old churches restored, and new parishes created. You will find that all this has been done, and is still being done, chiefly under the authority of acts of parliament passed since the year 1818, and under the superintendence and by the direction of a body of men known as the *Ecclesiastical Commissioners*. You must notice particularly the difference between (a) *public and private chapels*, (b) *parochial chapels and chapels of ease*, (c) *proprietary chapels and freechapels*.

**BOOK IV.—OF PUBLIC RIGHTS.**

**PART III.—OF THE SOCIAL ECONOMY OF THE REALM.**

**CHAPTER I.—Of the Laws relating to Corporations.**

- „ II.—*Of the Laws relating to the Poor.*
- „ III.—*Of the Laws relating to Charities, Friendly Societies, &c.*
- „ IV.—*Of the Laws relating to Education.*
- „ V.—*Of the Laws relating to Lunatic Asylums.*
- „ VI.—*Of the Laws relating to Prisons.*
- „ VII.—*Of the Laws relating to Highways.*
- „ VIII.—*Of the Laws relating to Navigation.*
- „ IX.—*Of the Laws relating to the Sanitary Condition of the People.*
- „ X.—*Of the Laws relating to Public Conveyances.*
- „ XI.—*Of the Laws relating to the Press.*
- „ XII.—*Of the Laws relating to Houses of Public Reception.*
- „ XIII.—*Of the Laws relating to Professions.*
- „ XIV.—*Of the Laws relating to Banks.*
- „ XV.—*Of the Laws relating to Registration of Births, Deaths, and Marriages.*

Of these Chapters, I., VIII., and XIII., alone call for particular notice.

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### Chapter I.—Of Corporations.

Corporations are “artificial persons created by the law and endowed by it with the capacity of perpetual succession.”

To the ancient Romans the honour of inventing corporations seems to belong, and from them our corporations are derived; and with us they subsist for a variety of purposes, and particularly for the advancement of religion, of learning, and of commerce. There are several kinds of corporations, and the first great division is into Corporations Sole and Corporations Aggregate; the former consisting, as its name implies, of one person only, and the latter of several persons united together into one society. Of corporations sole the Romans knew nothing, for in order that with them there might be a corporation three persons at least were required.

Corporations are also divided into—

- (a) Ecclesiastical; and these may be either *sole*, as a bishop, or *aggregate*, as the dean and chapter: and
- (b) Lay; and lay corporations are again sub-divided into (i) *civil*, which may be *sole*, as a king, or *aggregate*, as a trading company; and (ii) *eleemosynary*, as hospitals and colleges, both in and out the Universities.

Having thus divided corporations, the author of the Commentaries proceeds to consider several questions in connection with them, and the first question considered is—

#### I. *How may corporations be created?*

Corporations can only exist by the sovereign's consent; and this consent could formerly only be obtained by one of two means—viz. royal charter, and Act of Parliament. These modes were extremely expensive and inconvenient; and the fact that there was no other means by which several persons associated together could be formed into a body corporate gave rise to dissatisfaction, and in 1837 it was by statute provided that her Majesty might by *letters patent* grant the same privileges as before the Act could be granted by charter of incorporation. And in 1862, the Queen gave a general consent to the future creation of corporations by giving the royal assent to an



Act of Parliament passed in that year, and known as the Joint Stock Companies Act, by the provisions of which any *seven* or more persons joined together for a lawful object may of their own act make themselves a corporation by complying with the provisions of the statute, and registering themselves as a company or corporation under it.

Whether a corporation is formed by registration under this Act (the usual mode at present of becoming incorporated), or by Act of Parliament, charter, or letters patent, the corporation or company must have a name by which it performs all legal acts.

The second question considered is—

## II. *What are the powers, capacities, and incapacities of a corporation ?*

In connection with this question, see very carefully the eight points to which attention is drawn in pp. 11—16.

Some of the most important of the powers, &c. are—

- (a) To perform any act by the corporate name.
- (b) If a corporation aggregate, contracts by it in order to be binding must be under the common seal, except in some few cases—*e. g.* (i) When the contract relates to a trivial matter, as retaining a solicitor; (ii) When the contract is an executed one; (iii) In cases in which there is no time to obtain the common seal.
- (c) To make, alter, and repeal bye-laws for its own good government.
- (d) A corporation cannot (i) appear in Court by attorney; (ii) be an executor or administrator; (iii) be guilty of a crime; (iv) hold lands without a licence from the Crown; (v) if a corporation sole, hold chattels to itself and its successors. [Note the illustration of lease to John, Bishop of Oxford, and his successors, given at p. 16 of the Commentaries.]

The third question considered is—

## III. *How are corporations visited ?*

In order that corporations may not deviate from the end for which they were instituted, the law makes them subject to *visitation*, so that any irregularities which occur may be corrected. The persons on whom this duty of visiting falls differ according to the nature of the corporation; and the rules as to visitation may be thus summed up:—

- (a) All ecclesiastical corporations are visited by the ordinary, the Crown being supreme ordinary and visiting the archbishop, the arch-

bishop coming next and visiting the bishop, and bishops in their turn visiting rectors and vicars, and all other spiritual corporations.

(b) Lay corporations *eleemosynary* are visited by the founder, his heirs, appointees, or assigns; but with regard to *hospitals*, if the founder has not appointed any visitor, the duty of visiting falls on the bishop of the diocese; and with regard to *colleges*, if the founder does not appoint a visitor, the right to visit belongs to the Crown, and is exercised by the Lord Chancellor as its representative.

(c) Lay corporations *civil*. Irregularities occurring in these corporations are redressed by the judges of the Queen's Bench Division of the High Court of Justice.

The fourth question considered is—

#### IV. *How may corporations be dissolved?*

(a) By the loss of such an integral part of its members as is necessary to the validity of the corporate elections—*e. g.* the death of all the number, for here the power of continuing the succession is gone. [Notice hereon carefully the foot-note (*k*), in p. 30.]

(b) By surrendering its franchise to the Crown.

(c) By forfeiting its charter by negligence or abuses.

[N.B.—The franchises of the city of London cannot be forfeited.]

These being some of the leading points to remember in connection with corporations generally, I shall now draw your attention specially to certain particular matters affecting the most important class of corporations, namely—Companies or Corporations registered under the Joint Stock Companies Acts, 1862, 1867, 1877 and 1879.

The usual way in which, at the present time, a company becomes incorporated is by registration under the Companies Acts. Under these Acts, *seven* (or more) persons *may*, and *twenty* (or more) persons *must* if they are associated together for the acquisition of gain (unless incorporated by some private Act of Parliament, charter, or letters patent), register themselves by subscribing their names to a memorandum of association, and leaving this memorandum with the registrar of Joint Stock Companies. The memorandum of association *may*, where the company is limited by *shares* (*i. e.* where a member's liability is limited to the amount unpaid on his shares), and *must*, where it is limited by *guarantee* (*i. e.* where a member's liability is limited to the amount he has undertaken to contribute to the assets of the company in the event of its being wound up), be accompanied

after registration by *articles of association*. Companies may also be registered under the Act as *unlimited* (*i. e.* where a member's liability in respect of the debts of the company is to the extent of his fortune).

After registration, the company is a corporation with right of perpetual succession, and of holding lands [but note that registered companies formed to promote *art, science, religion, or charity*, cannot hold more than two acres without the licence of the Board of Trade].

The business of the company is carried on by the *directors*, appointed for the purpose, like an ordinary business, until it becomes necessary to *wind it up*. This winding-up may be carried out by the company itself, when it is called a *voluntary* winding-up, and this takes place—

- (a) Whenever the time or object for which the company was formed has run out or been fulfilled;
- (b) Whenever the company has passed a *special resolution* to wind up;
- (c) Whenever the company has passed an *extraordinary resolution* that the company is unable to meet its engagements and ought to be wound up;

or the winding-up may be by the Court (*i. e.* the Chancery Division of the High Court of Justice), when it is called a *compulsory* winding-up. An order for a compulsory winding-up may be made on the application of the company itself, or a creditor, or a contributory (*i. e.* a person liable to contribute to the company's debts), on any of the following grounds:—

- (a) When a special resolution requiring a compulsory winding-up has been passed;
- (b) When the company does not commence business, or suspends business, for a year;
- (c) When the numbers of the members are reduced to less than seven;
- (d) When the company is insolvent (*i. e.* when it is proved to have failed to meet the written demand of a 50*l.* creditor for three weeks, or an execution against it has been returned unsatisfied, wholly or in part, or when the Court thinks from other facts that it is unable to pay its debts);
- (e) When the Court thinks it just or equitable.

The winding-up is carried out by a liquidator appointed for the purpose (called an *official* liquidator when the winding-up is compulsory), whose duties resemble those of a trustee in bankruptcy, and consist in ascertaining the liabilities of the company, settling the lists of contributories, making calls, and paying the debts.

The lists of contributories referred to contain the names of persons who are liable to contribute towards the debts of the company. There are two lists—the A list and the B list. The former (A list) contains the names of the shareholders who were shareholders at the time of the winding-up taking place, and these shareholders must be looked to first. The latter (B list) contains the names of those who have been shareholders, and who have ceased to be such within a year of the winding-up; but these shareholders are only liable for debts which were contracted before they ceased to be members, and they cannot be looked to until the liability of the contributories on list A has been exhausted.

The liability of the contributories differs according to whether the company is *limited* or *unlimited*; and, if limited, whether limited by *shares* or by *guarantee*. If limited by shares, the liquidator may *make calls* (under order of the Court if the winding-up is compulsory) on the contributories for any amount not exceeding the amount still unpaid on their shares, and if limited by guarantee, then for any amount not exceeding the amount guaranteed; and if unlimited, then to the extent of the fortune of the contributories, or as far as may be necessary for the purpose of paying the debts of the company.

When the official liquidator has completed the winding-up, an order of the Court, in the case of a compulsory winding-up, must be obtained dissolving the company; and in the case of a voluntary winding-up, a general meeting of the company must be called, at which the liquidator produces his account, and a return of the meeting must be made to the registrar, and three months afterwards the company will be deemed to be wound up.

#### POINTS TO NOTE.

- I. What the proper words are by which corporations are created by the Crown.
- II. What the term "Guildhall" is derived from.
- III. In what way a member of a corporation may be disfranchised.
- IV. What becomes of the debts due to or from a corporation aggregate on its dissolution.
- V. What the origin of the incorporation of English towns is.
- VI. What a municipal corporation is.

- VII. What the chief provisions of the Municipal Corporations Act, 1835, are, and what circumstances led to its being passed.
- VIII. What the following terms used in the Municipal Corporations Act mean :—"Burgess," "the Council."
- IX. What the duties under the Act of the "auditors" and "assessors" are, and by whom these officers are elected.
- X. In what cases a borough is entitled to have a coroner and a clerk of the peace.
- XI. What course has to be adopted when it is desired to sell or mortgage the property of the borough.
- XII. For what purposes the "Borough Fund" is applied.
- XIII. What the distinction between the "Burgess Roll" and the "Freemen's Roll" is.
- XIV. How a man becomes a burgess or freeman of a borough, and how far the law on the point was altered by the Municipal Corporations Act, 1835.

#### Chapter VIII.—Of the Laws relating to Navigation.

This is a somewhat important Chapter; and of the seven heads into which the author of the Commentaries divides the subject, heads Nos. II. and VI. require particular notice.

In connection with head No. II., which treats of "The Ownership, Registration, and Transfer of Merchant Ships," you must remember the following.—

(a) Every ship, in order to be entitled to the advantages of a British ship, must be duly registered at some port within the United Kingdom.

(b) The register must show (*inter alia*) the name of the ship (which must, previous to registration, be marked in a conspicuous manner on her bows), and the names and description of her owners.

(c) The persons entitled to be registered as owners of British ships are (i) All natural-born subjects of her Majesty who have not taken the oath of allegiance to a foreign sovereign or state; (ii) Bodies corporate having their principal place of business within the United Kingdom, or some British possession, and being subject to the British laws; (iii) Aliens who have been naturalized by Act of Parliament.

or by letters denizens, and have taken an oath of allegiance to her Majesty, and are resident in her Majesty's dominions.

[N.B.—The Naturalization Act of 1870, confers no right on aliens to hold shares in British ships.]

(d) The property in every ship is divided into sixty-four shares, and not more than sixty-four (formerly thirty-two) persons can be registered as owners of one ship,—save that any number of persons not exceeding five may be registered as joint owners of one share. (See Merchant Shipping Act, 1880.)

(e) The legal property in a registered ship, or in shares thereof, is in the persons whose names are on the register; but other persons having equitable rights in such ship or shares may enforce the same in the Chancery Division of the High Court of Justice.

(f) The property in British ships, or in shares therein, is transferred by bill of sale, in the form prescribed in the Merchant Shipping Act, under the hand and seal of the transferor, the title of the transferee being completed by his name being entered on the register at the ship's port of registry.

(g) Mortgages of British ships, and of shares therein, are also by bill of sale, in the form given in the Merchant Shipping Act, which have to be entered on the register at the ship's port of registry.

(h) Where there are several mortgages of the same ship or share, the mortgagees' priorities are regulated according to the date of registration, and not according to the date of execution of the mortgage.

(i) A subsequent mortgagee cannot sell the ship or share except with the concurrence of the prior mortgagees, or by order of the Court (Admiralty Division); but the concurrence of the mortgagor is never required.

In connection with head No. VI., which treats of "The liability of shipowners for loss or damage," you will remember from the Chapter on Contracts in Vol. II. the nature of a shipowner's responsibility for the loss of or injury to the goods on board his ship entrusted to him for carriage. But not only is a shipowner liable as a carrier of goods, he is also liable for anything done by those he employs in the course of their employment, just as an ordinary master is for the acts of his servant; subject to this, that if he can show he is personally free from blame, his liability is limited to 8*l.* per ton of the ship's tonnage for loss of or damage to property, and 15*l.* per ton for loss of

life or personal injury, and no action lies for this latter sum until an inquiry has been held before the sheriff at the instance of the Board of Trade, or until the Board has refused to institute the proceedings. This statutory provision applies to foreign as well as to British ships. Statute law further protects British shipowners by providing that where several claims are made against them for loss of life or personal injury, or for loss of or damage to goods, the shipowner can institute proceedings to determine his aggregate liability, and the Court may distribute the amount rateably among the claimants.

#### Chapter XIII.—Of the Laws relating to Professions.

##### REMARKS.

There are a few points of importance in this Chapter relating to solicitors, to which I must draw your special attention.

The following steps must have been taken before a person can practise as a solicitor in England :—

(a) He must have duly served his articles of clerkship, which generally extend over a period of five years, but sometimes the term is *four*, and sometimes *three*, years.

[N.B.—The following are some of the rights of an articulated clerk during his articles :—

- (i) He can spend the last year of the term with a practising barrister, or the London agent of the solicitor to whom he is bound.
- (ii) He can, with the sanction of his principal, and the leave of certain judges of the High Court (practically the Master of the Rolls), hold an office or appointment. This right was conferred by an Act passed in 1874 (37 & 38 Vict. c. 68) ; before this Act, an articulated clerk could not hold such an appointment without vitiating his articles.
- (iii) He has the right to claim a discharge from his articles, with a return of a portion of the premium, or an assignment thereof to another solicitor if his principal becomes bankrupt, or is imprisoned for debt for twenty-one days.
- (iv) He can, if his principal dies or leaves off business, enter into fresh articles for the residue of the term with another solicitor. This can also be done by agreement between the principal and the clerk at any time.]

(b) He must have passed the Examinations required by statute, and conducted by the Law Society, and have obtained the Examiners' certificate of his proficiency and fitness to practise as a solicitor.

(c) He must, having first taken the oath of allegiance, and the oath to properly demean himself in his profession, have been admitted a solicitor, and had his name duly enrolled on the books.

(d) He must have taken out his certificate to practise, and renewed it yearly.

[N.B.—The stamp duty payable on these certificates, is, for a solicitor who practises in London or within ten miles, 4*l.* 10*s.* for the first three years after admission, and 9*l.* for each subsequent year; and for other solicitors, not practising within this radius, 3*l.* for the first three years, and 6*l.* for each subsequent year. If a solicitor neglects to take out or renew his certificate for one whole year, an order from the Master of the Rolls is necessary before a certificate can be taken out.]

Having gone through these formalities a person is entitled to practise as a solicitor, and to recover his proper fees in a Court of law. One month before action, however, he must deliver his bill of costs duly signed by him, or sent with a letter duly signed by him referring to it, in order to enable the client to have the bill taxed before judgment is obtained against him.

[Note hereon the following:—

- (i) A solicitor can set off his bill of costs against a claim raised by his client against him, although no signed bill delivered.
- (ii) A solicitor can, if he is able to show that his client is about to go abroad to evade payment of his bill, obtain an order allowing him to bring an action, although the month after delivering the bill has not expired.
- (iii) A client may obtain an order commanding his solicitor to deliver up papers, &c. in his possession.]

A solicitor may make an agreement with his client to charge him so much for work done, or to be done; but the agreement is, if it relate to proceedings in any Court, subject to taxation, and any provision contained in it freeing the solicitor from liability for negligence, &c., is utterly void; and the whole agreement may, if the Court think it unreasonable, be set aside; so that the solicitor does not derive much benefit from the Act which conferred upon him this limited right of contracting with his client. The Act is the Soli-



citors' Act, 1870; an Act which also allowed a taxing-master when taxing a bill to take into consideration, not only the actual work done (the folios written), but the skill, labour, and responsibility involved in the work.

Under the Solicitors' Remuneration Act, 1881, the Lord Chancellor and certain other persons are authorized to make a general order regulating the fees to be paid to solicitors for conveyancing and other work of a non-contentious character—no order has, however, yet been made under the Act.

A solicitor has always had the right to act as a justice of the peace for a borough, but he had no right to act as a justice for the county until, in 1871, the right was conferred on him by statute (34 & 35 Vict. c. 18) to act as a justice of the peace for a county *in which he does not practise as a solicitor*.

A barrister of five years' standing is now entitled, on passing the "Final Examination," and without serving under articles, to be admitted as a solicitor (40 & 41 Vict. c. 25); but no similar advantage of enabling members of the lower branch of the profession to pass into the higher branch has yet been conferred.

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## Tenth Week's Work.

### BOOK V.

- CHAPTER I.—*Of Redress of Injuries by mere act of the Parties.*  
 „ II.—*Of Redress by mere Operation of Law.*  
 „ III.—*Of the Courts in General.*  
 „ IV.—*Of the Inferior Courts.*  
 „ V.—*Of the Supreme Court of Judicature.*  
 „ VI.—*Of the Ultimate Courts of Appeal.*

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### BOOK V.—OF CIVIL INJURIES.

#### REMARKS.

The whole of this Book V., treating of Civil Injuries and their Remedies, is important for your purpose, and Chapters I., II., VII., VIII., IX., and X. are especially important, all of them being

Chapters from which questions are extremely likely to be taken. Let us now proceed to a consideration of them.

### Chapter I.—Of Redress by Act of Parties.

#### REMARKS.

It is a maxim of our law that there is no wrong without a remedy ; that is to say, a man is supposed to have either at law or in equity some means by which he can redress an *injury*. By the term “injury” you must understand not merely a loss or wrong *in foro conscientie*,—for this may be a *damnum sine injuria*, and not capable of redress,—but some *legal* wrong, *i. e.*, the violation of some right ; and in all cases where such a violation occurs there is redress, and this whether a loss is involved as well or not, for it is a maxim that *injuria sine damno* is capable of redress. The nature of the redress depends on the nature of the wrong done. If the wrong done not only affects an individual, or a class of individuals, but has an evil tendency to the whole community, it then amounts to a *crime*, and the redress is by means of criminal proceedings against the wrong-doer, with the view of obtaining his public punishment, and thus, by affording an example of him, prevent others from following in his evil ways. If, on the other hand, the wrong done affects an individual only, or a particular class of individuals only, and has no general evil tendency, the wrong amounts to a *civil injury* only, and is capable of private redress, and this redress is usually obtained by an action taken in the proper Court ; but in some cases a person is allowed to take the law into his own hands, and redress the injury himself, and of this species of redress the present Chapter treats ; and in other cases (two only) a redress is afforded by mere operation of law, and of that species of redress the next Chapter treats.

To return to the subject of the Chapter—

Redress by act of the parties may be either (a) by sole act of the injured party alone, or (b) by the joint act of the injured and injuring parties.

(a) The various redresses by sole act of the party injured are :—

I. *Self-defence*. If one man assaults another, or another’s wife, child or servant, the party assaulted, &c. may repel force by force without incurring legal liability. A self-remedy allowed on

two grounds: (i) because the law respects the passions of the human mind, and therefore allows that to be done which nature prompts; (ii) because if a man was not allowed to do this, there is no telling to what length the assailant might go. The person assaulted must not go unnecessarily far in resisting, otherwise he will become the assailant, and liable to an action.

- II. *Recaption or Reprisal*. If one man takes another's goods away, the owner may *peaceably* retake them wherever he finds them. A self-remedy allowed because during the time necessarily spent in bringing an action the wrongdoer might part with the chattel and so deprive the injured party of his proper remedy, viz. the restoration of the chattel of which he was deprived. The only case in which force is allowed to be used in recaption is where a horse has been *stolen*, for then the owner can break open a stable door to retake the animal.
- III. *Entry on lands*, of which the person entering has been wrongfully deprived. The entry must be peaceable, and made within twelve years of the right to enter accruing (37 & 38 Vict. c. 57). This self-remedy has naturally no application to incorporeal hereditaments.
- IV. *Abatement of a nuisance*. Thus, if a man builds a wall, and thereby defeats another's ancient light, that other can enter on the wrongdoer's land and pull down the wall. Here, again, the entry must be peaceably effected.

The fifth species of private distress is of a very important nature, and you must pay particular attention to it. It relates to the well known self-remedy of—

- V. *DISTRESS*—or “the taking of a personal chattel out of the possession of the owner into the custody of the party injured, in order to procure satisfaction of the wrong suffered.” Following the heads given in the Commentaries, the first question to consider in connection with the law of distress is—

(1) *For what injuries may a distress be taken?* The two main injuries for which distress lies are (i) Distress for rent in arrear, including now rent service, rent charge, rent seek, rents of assize, chief rents (for an explanation of these terms, see *ante*, pp. 93, 94,

and Vol. I. of the Commentaries, p. 671); and (ii) Distress for cattle *damage feasant*—i. e. the right of a person to distrain and keep animals which come upon his lands without any fault of his (the distrainer's) and do damage; (iii) Distress in addition lies for neglecting the suit at the lord's court, or for neglecting to pay amerciaments (fines) imposed by a court leet; (iv) Distress is also given by Act of Parliament to recover penalties, rates, taxes, &c. (see footnote in the Commentaries, p. 249).

(I specially call your attention to the fact that distress lies for other injuries than rent in arrear, because I have found that my own pupils so often make a mistake on this point.)

The second question considered is—

(2) *What things may be taken in distress?* The general rule is, that under a distress all the goods and chattels found upon the land demised may be taken, whether they belong to the tenant or a stranger; but to this sweeping rule the following exceptions exist:—

- (i) Things in which a man can have no absolute property—e. g. cats, rabbits, and all animals *feræ naturæ*.

[Note hereon that deer in a park can be distrained; so can any animal which, though naturally wild, has been tamed—e. g. a dancing bear; and it seems that dogs can be distrained now-a-days, although formerly, as they were considered *vermin*, they could not be distrained.]

- (ii) Anything in actual use,—as an axe which the tenant is using, or a horse he is riding.

[N.B.—This exception is to prevent breaches of the peace, which would probably occur if such things could be distrained.]

- (iii) Things sent to the tenant to be wrought on in the course of his trade,—as a horse sent to a smith's to be shod.

[N.B.—This exception is necessary for the protection of small tradespeople, who would not be trusted with goods to work on if they were liable to be distrained upon for the tradesman's rent.]

- (iv) Goods of a lodger, if the lodger take advantage of the provisions of the Lodgers' Protection Act, 1879, and makes a declaration showing that the goods taken are his, and offer-

ing to pay whatever rent he owes to his immediate landlord.  
(See p. 250.)

- (v) The beasts of a stranger. These cannot be distrained, if they have come on the land through defect in the hedges, until they have been one night, at least, on the premises, nor until, if the landlord or tenant was bound to repair the fences, notice of the animals being on the premises has been given to the owner of them. And if before this time the owner takes them away, the right to distrain them is gone. In other cases the beasts of a stranger are not privileged.
- (vi) Things in the custody of the law,—as goods taken under an execution; but the sheriff must pay the landlord a year's rent.
- (vii) Loose money.  
[N.B.—Money in a *sealed bag* can be distrained.]
- (viii) Things which cannot be restored in as good a state as when taken. Under this exception come all perishable articles,—such as fruit and milk.  
[NOTE.—This exception does not now include corn reaped, or hay (2 Will. & M. c. 5).]
- (ix) Fixtures affixed to the freehold,—as windows, caldrons.  
[NOTE.—This exception does not now include growing products of the earth,—as growing corn, which the landlord can distrain and cut when ripe (11 Geo. II. c. 19).]

The nine classes of goods above given are *absolutely* privileged. The following are privileged *sub modo*—*i. e.* they cannot be taken until after the other chattels have been distrained, and only then if the rent is still unsatisfied. The things thus partially privileged are—(i) The instruments of a man's trade—*e. g.* a scholar's books—a stocking weaver's frame; (ii) The beasts of the plough, sheep, and instruments of husbandry.

[NOTE.—These things are absolutely privileged if they are in actual use, for then they come under the second exception above given. Beasts of the plough—which include horses and oxen, but not colts, steers, or heifers—are not excepted under distresses for poor rates.]

The third question considered is—

(3) *How may distresses be taken, disposed of, or avoided?*

(a) The distress must be made between sunrise and sunset, except distress for animals *damage feasant*; for these may be taken at any time, for fear of the animals' escape.

(b) The distress must be made during the tenancy, or within six months after its expiration, and must not be for more than six years' arrears.

[NOTE.—You will remember from the Chapter on Bankruptcy that the landlord's right of distress is cut down on his tenant's bankruptcy to one year's arrears accrued due before bankruptcy. (See ante, p. 142).]

(c) The distress is effected by the landlord, or his duly-authorized agent (a written authority is not necessary, but desirable), entering on the demised premises *peaceably*; for he cannot break open an *outer* door—"Every Englishman's house being his castle;" but *inner* doors may be broken open.

[N.B.—The only case in which an outer door may be broken in distress is where the goods have been fraudulently or clandestinely removed within thirty days previously to prevent distress; an outer door may be broken to retake them, oath having first been made before a magistrate as to the removal, and the breaking being made in the presence of a peace officer (11 Geo. II. c. 19).]

(d) The landlord or bailiff seizes sufficient goods to meet the claim, makes an inventory thereof, and gives a copy with a written notice of the distress to the tenant, stating when the claim must be paid, or the goods replevied.

(e) The goods are then impounded—*i. e.* removed to a place of safe custody—and after five days, having in the meantime been duly appraised, the goods are sold, and the sale moneys applied in satisfaction of the rent and expenses, any balance being handed to the tenant.

(f) If the first distress is insufficient, a second may be made.

(g) The proper remedy for a wholly illegal distress, if no rent is in arrear, is replevin to obtain a restitution of the goods; and for an excessive distress is by special action under the Statute of Marlbridge, which imposes a heavy amercement on a landlord for taking an unreasonable distress.

(h) Formerly, if a landlord in distraining was guilty of any un-

lawful act he became a trespasser *ab initio*, as he abused an authority given him by the law, but now he is only liable to be sued for the real damage sustained (11 Geo. II. c. 19).

A sixth species of self-remedy, by the act of the injured party, given is—

#### VI. The seizing of heriots when due on the death of a tenant.

Heriots, as you will remember from Volume I., may be either heriot-service or heriot-custom, and while for the former the lord can distrain any chattel as he can for rent, for the latter he has no general right of distress, but merely the right to seize the identical chattel forming the heriot. A similar remedy by way of seizure is allowed in cases of waifs, estrays, and other franchises.

The other species of self-remedy, namely, by joint act of the injured and injuring party, are—I. *By accord and satisfaction*; II. *By arbitration*.

I. Accord and satisfaction would arise under the following circumstances:—A. injures B. in some way, and B. agrees to accept so much for the injury—say 100%.; this agreement is called the “accord,” and when performed by the payment of the 100% satisfaction takes place, and no action for the injury would lie; and if B. were to bring an action after this agreement and payment, A. could plead as a successful defence “accord and satisfaction” of the injury.

[N.B.—A smaller sum can never be pleaded as a satisfaction of a larger—thus, if A. owes B. 100%., and B. accepts 5% in satisfaction, and then brings an action for the balance, the plea of “accord and satisfaction” would be no answer to the action; and notwithstanding the acceptance of B. in satisfaction, he would be entitled to a verdict for the balance of 95%. If, however, anything else but money, however valueless, had been accepted in satisfaction, B.’s right of action would be gone; *e.g.* supposing a negotiable instrument for 5% had been given, or an old horse not worth 1% a leg, A. could successfully plead satisfaction to any action brought by B.]

A more common self-remedy by joint act of the parties is the second species referred to, namely:—

II. *Arbitration*, arising where the parties agree to refer some matters in dispute to the judgment of a third person, called an arbi-

trator, or sometimes to two or more arbitrators, with a third person added, called an umpire, to decide the dispute in the event of the arbitrators' disagreement.

In connection with arbitration, the following points must be borne in mind:—

(a) The agreement to refer may be by parol, or in writing, or by deed.

(b) If it is in writing, or by deed, it may be made a rule of Court, and thus brought under the Court's notice.

(c) The arbitrators enter on their duties, and the hearing before them is conducted like that of a trial before a jury.

(d) After hearing the evidence, the arbitrators make their *award* within the time allowed them by the submission, or if no time mentioned, then within a reasonable time.

(e) If the submission has been made a rule of Court, any party disobeying the award may be punished for contempt of Court, and the award may be enforced by action, and where for payment of money or costs by execution, as on a judgment.

(f) The award may, if the agreement has been made a rule of Court, be set aside if defective, *e. g.* if it is inconsistent, or not final, or if the arbitrator has been guilty of misconduct, the application to set it aside being made before the last day of the term after the publication of the award.

[N.B.—In addition to arbitration of matters by the agreement of the parties without action, matters the subject of an action are constantly referred by way of arbitration to a referee, by order of the Court—a course first allowed by the Common Law Procedure Act, 1854, and particularly encouraged by the provisions of the Judicature Act, 1873, and orders drawn up thereunder, but these arbitrations arising out of an action are not treated of by the author of the Commentaries in this Chapter, as they are clearly not a means of “redress by the act of the parties alone.” See footnote, p. 264.]

#### POINTS TO NOTE.

- I. Under what circumstances a distress may be rescued by the owner.
- II. To what penalty a person is subject under 6 & 7 Vict. c. 30, for rescuing cattle taken damage feasant.



- III. What a *pound* is, and what the different kinds of pounds are.
- IV. What a tenant must do when he wishes to prevent goods taken under a distress being sold.
- V. C. is jointly indebted to and sued by A. and B., whether C. could plead satisfaction and accord with A. alone.

#### Chapter II.—Of Redress by mere Operation of Law.

##### REMARKS.

Another very important Chapter for your purpose.

In two cases only the law affords a man a remedy for an injury without obliging him to take any steps to obtain it. These cases are:—I. *Retainer*; II. *Remitter*.

I. *Retainer*. You will remember from Vol. II. of the Commentaries (see *ante*, p. 153), that retainer is an important right conferred on an executor and administrator of a deceased testator or intestate, to retain his own debt, if he happens to be a creditor of the deceased, out of assets which come to his hands before paying other creditors of *equal degree*, and this even though his own debt is statute-barred.

[NOTE the words italicised : for an executor could not pay himself, whether a specialty, or simple contract, or judgment creditor of the deceased, before paying a debt due to the Crown, or debt incurred for the funeral expenses, these debts being of a higher nature, and being paid first; see *ante*, p. 152. Note, also, that the right, although generally referred to as the *executor's* right of retainer, applies to administrators as well as executors, but that it does not apply to an executor *de son tort*. And lastly, note, that if A. and B. are executors (or administrators) of C., and also creditors of his, out of any assets coming to either A. or B. in their representative capacity both will be entitled to receive an equal proportion in satisfaction or part satisfaction of their debt, for an executor cannot retain his own debt in preference to that of his co-executor of equal degree. See p. 264.]

II. *Remitter*. See the definition given on p. 267. An example will assist you to understand this species of redress by operation of law. A. wrongfully turns B. out of his lands; B.'s proper

remedy to regain possession will be by entry, if he can do so peaceably (see *ante*, p. 214), and if not, by action to recover possession. Neither of these steps on B.'s part will, however, be necessary if A., by word of mouth, or by writing, had granted a demise of the lands to B. as tenant from year to year, for such demise will operate as a *remitter*—that is, B. will, by this subsequent, and of course defective, title which he obtains to the lands, be *remitted* or sent back to the old and good title which he had before being turned out of possession.

NOTE HERE that had the lease to B. been by *deed* or by *matter of record*, no remitter would have occurred, because the doctrine of estoppel, which applies to deeds and records, would in such a case prevent B. from alleging that A., his lessor, had no right to make the lease, and a man is never allowed to say that his own deed is ineffectual.]

After noting carefully how Blackstone treats the doctrine of “remitter” (see footnote, p. 268), and how the doctrine is justified by Littleton, you must pass on to the next Chapter.

### Chapter III.—Of the Courts in General.

#### REMARKS.

A man who has suffered an injury, that is, has had some legal right invaded, if not able to redress it himself by one of the modes pointed out in Chapter I., *ante*, p. 213, or if it is not redressed by mere operation of law in the manner shown in the last Chapter, can always obtain redress by action in the proper *Court*.

In treating of the remedies afforded by Courts, the author of the Commentaries in this Chapter gives some general remarks on the nature of the Courts themselves, and in the three following Chapters considers the various Courts erected and acknowledged by the laws of England.

In connection with the general nature of Courts the following points are important for your purpose:—

- (a) A court is a place wherein justice is judicially administered.
- (b) All Courts of justice are derived from the Crown, and the Sovereign is supposed to be present in every Court, being represented by the judges.

(c) There are a variety of Courts having different jurisdiction—some of these being Courts of Record, and some Courts not of Record.

(d) A Court of Record is a Court whose acts and judicial proceedings are enrolled, and which has power to fine and imprison for contempt of its authority, while Courts not of record are of inferior dignity, having no power to fine and imprison as a general rule, and keeping no record of their proceedings; they are, in fact, the Courts of a private person, while Courts of Record are Courts of the Sovereign.

(e) Every Court has three constituent parts: viz. 1. The *actus* or plaintiff, who complains of an injury done. 2. The *reus* or defendant, who is called upon to make satisfaction for the injury done. 3. The *judex* or judicial power, with a fourfold duty—viz., *first*, to examine the truth of the fact; *secondly*, to determine the law upon the fact; *thirdly*, to ascertain the remedy; and *fourthly*, by its officers to apply the remedy.

(f) In the higher Courts of justice, solicitors and counsel render assistance. The solicitor represents the *procurator* or proctor, and the counsel the *advocate*, among the civilians.

(g) Of counsel there are two species or degrees, viz., *barristers* and *serjeants*.

(h) The ancient and honourable state and degree of serjeant had formerly to be taken by a barrister before he was made a judge, but the necessity for this step was abolished by the Judicature Act, 1873.

(i) Solicitors are entitled to charge for work done by them and are responsible to their clients for negligence; but barristers' work is *supposed* to be honorary, and they can maintain no action for their fees, and are not responsible for negligence.

(j) A counsel is not responsible for statements made by him *relative to the cause in hand, and suggested by his client*, however groundless and damaging the statements may be, but in other cases he is. After noticing the privileges possessed by barristers and solicitors (see p. 278) you must pass on to the next Chapter, which contains some, though not very much, important matter for your purpose.

## Chapter IV.—Of Inferior Courts.

## REMARKS.

At the time of the Conquest the English Courts were of a rude and simple nature, and consisted of—

- I. The King's Court or Court of Aula Regis, having jurisdiction in all civil matters whatsoever (about which more will appear in the next Chapter).
- II. The *Court Baron* of manors for matters arising within the manor.
- III. The *Hundred Courts*. Similar Courts for the districts termed hundreds.
- IV. The *Sheriff's Court*. A Court originally of great splendour and dignity for county matters, with power to hold pleas of debt or damages up to 40s., and also to hold pleas of any real action.

These Courts (the Courts Baron, Hundred Courts, and Sheriffs' Courts) are now represented by the inferior Courts next to be considered, and which require your particular attention, namely:—

- V. The *County Courts*. These were established in 1846 by 9 & 10 Vict. c. 95, to supply the place of a great variety of inferior tribunals known as Courts of Request or Conscience, which had themselves been instituted to supply the deficiencies, and remedy the inconveniencies of the Sheriff's Court.

There are upwards of 400 county courts in the country, each court having jurisdiction over a certain district. In connection with these courts the following points must be particularly noticed:—

(a) By agreement *in writing* between the parties, every action, whatever amount or question it involves, may be commenced in a county court.

(b) In actions of contract, except breach of promise of marriage, and of tort, libel, slander, malicious prosecution and seduction, the county courts have jurisdiction up to 50*l*.

(c) In ejectment, and in actions involving a question of title to hereditaments, or of toll, market, fair or franchise, the jurisdiction is limited to cases in which the rent or value of the property does not exceed 20*l*.

(d) In ejectment against tenants at sufferance they have jurisdiction when the rent or annual value does not exceed 50*l*.

(e) Questions arising under wills or settlements cannot be decided

in the county court, except by agreement, or except they arise under the Court's equitable jurisdiction.

(f) In certain equitable matters county courts have jurisdiction up to 500*l*. For a list of these matters see p. 293 of the Commentaries.

(g) Certain county courts have bankruptcy jurisdiction.

(h) County courts have probate jurisdiction in the following cases :—

- (1) In contentious business, when the personal estate does not exceed 200*l*. and the real estate 300*l*. (2) In non-contentious business, in granting administration to the widow or children of a deceased intestate whose assets do not exceed 100*l*.

(i) Certain county courts in maritime ports have a limited admiralty jurisdiction in questions of salvage, towage, necessaries, wages, and claims for damage done by collision, or to cargo.

(j) A peculiar jurisdiction, sometimes of an original, and sometimes of an auxiliary nature, is conferred on county courts by various Acts of Parliament, and notably by the Agricultural Holdings Act, 1875, to determine questions of compensation between landlord and tenant; by the Married Women's Property Act, 1870, to determine questions under the Act between husband and wife; by the Employers' and Workmen's Act, 1875, to determine questions between master and servant. [See further, footnote on page 295.]

(k) The county court to proceed in is that having jurisdiction where the defendant resides, or carries on business, or (by leave of the registrar) where the cause of action wholly or in part arose.

(l) In cases of small claims, in respect of which the county court has jurisdiction, a plaintiff should always proceed in the county court, for if he proceeds in the superior court and does not get more than 20*l*. on contract, or more than 10*l*. on tort, he will not get the costs of the action, unless the judge expressly certifies for them.

(m) Actions of contract, not involving 50*l*., commenced in the High Court, may be remitted to the county court on the *defendant's* application.

(n) Equitable actions, in which the county courts have jurisdiction (see p. 293 of the Commentaries), commenced in the High Court, may be remitted to the county court on the application of either *plaintiff* or *defendant*.

(o) Actions of tort, commenced in the High Court, may be remitted to the county court on the application of the defendant, supported by

affidavit, showing that the plaintiff has no visible means of paying the costs of the action if unsuccessful. The order is not made if the plaintiff either satisfies the court that he has a good cause of action to be prosecuted in the High Court, or gives satisfactory security for costs.

(p) Proceedings in county courts are commenced by a *plaint*, which is followed by a *summons*, and the case comes on for hearing in court. If the defendant relies on any special plea, such as set-off, payment, &c., he must give proper notice thereof five days before the hearing; and if the summons issued is a default summons, under section 1 of the County Court Act, 1875, he must, within sixteen days of being served, give notice of his intention to defend the action, otherwise the plaintiff will be entitled to judgment without proceeding any further in his action. If the amount involved exceeds 5*l.*, either party can have a jury. County court juries consist of five persons only.

(q) If the county court judge makes a mistake on a point of law, or wrongfully rejects or admits evidence in an action involving more than 20*l.*, an appeal as of right lies to a Divisional Court of the High Court. The appeal may be either by way of *special case*, or by *motion*. In other cases an appeal can only be had by leave of the county court judge.

(r) Proceedings commenced in the county court may be removed into the High Court by writ of *certiorari*, obtained from the Queen's Bench Division.

The next courts of inferior jurisdiction mentioned in the Commentaries are—

The Courts of certain cities, boroughs, and corporations, held by prescription, custom, or Act of Parliament, which call for no particular comment from me, except that I would draw your attention to the footnote on p. 295, relating to certain courts having jurisdiction within the City of London, viz.—(i) The Court of Hustings; (ii) The Lord Mayor's Court; and (iii) The City of London Court.

VI. *The Courts of the Commissioners of Sewers*, having jurisdiction to overlook the repairs of the banks and walls of the sea coast, and of navigable rivers, and to cleanse rivers and streams communicating therewith.

VII. *The Court of the Stannaries of Cornwall and Devon*, having juris-

diction to determine all questions among the tanners (or miners) in these counties, except pleas of land, life and member. The judge of the Court is the vice-warden, and appeal from his decision now lies to the Court of Appeal instead of to the Lord Warden of the Stannaries, as formerly.

VIII. *The Courts of the Universities of Oxford and Cambridge*, having jurisdiction over causes of action arising within the liberties of the Universities, and relating to some member or servant of the University resident therein at the time of action brought. These Courts were established in early days by charters from the Crown, in order that the students might not be distracted from their studies by legal process from distant Courts.

IX. *Ecclesiastical Courts*. You will remember from the Introduction, in Vol. I., that these Courts are of an inferior nature. Originally, civil and ecclesiastical matters were determined by the same Courts, but William the Conqueror separated the ecclesiastical from the civil jurisdiction, and prohibited any spiritual cause being tried by the secular Courts, commanding suitors to appear before the bishop only, and Ecclesiastical Courts, with a separate and distinct jurisdiction, became established in the land. Not only was the jurisdiction distinct, but the laws followed by these Courts were different; for while the Civil or Common Law Courts followed the common law of England, the Ecclesiastical Courts followed the canon law of the Romans, and this difference prevented any subsequent coalition of the Civil and Spiritual Courts, and consequently the Ecclesiastical Courts exist at the present day as distinct tribunals, exercising an inferior jurisdiction in matters ecclesiastical. They were deprived of their jurisdiction in probate matters and in matrimonial and divorce causes in 1857, as you will remember from the Chapters on Will and Administration and Husband and Wife, in Vol. II. (See *ante*, pp. 147, 167.)

The various Courts exercising ecclesiastical jurisdiction are (a) The Archdeacon's Court, the most inferior Court of the whole ecclesiastical polity, held generally before the archdeacon's *official*. An appeal lies from this Court to (b) The Consistory Court, held in the cathedral of every bishop for trying ecclesiastical causes within the diocese. An appeal lies to (c) The Provincial Court of the Archbishop. This, in

the province of York, is termed the *Chancery Court*, and, in the province of Canterbury, the *Court of Arches*. These two Courts are, however, now united under the Public Worship Regulation Act, 1874, and their jurisdiction vested in the judge appointed under this Act, who is styled "the judge of the Provincial Courts of Canterbury and York." (See p. 309 of Commentaries.) An appeal lies to (d) the Judicial Committee of the Privy Council, which has been substituted for the "Court of Delegates." The Appellate Jurisdiction Act, 1876, provides that her Majesty may make rules for the attendance of the archbishops or bishops at the hearing by the Judicial Committee of Ecclesiastical Causes.

The injuries treated of in this Chapter as capable of redress in the Ecclesiastical Courts are—(a) The *subtraction* or withholding of *tithes*—a claim which rarely now occurs owing to a rent-charge, with peculiar and speedy means of enforcing the payment of it, having been established in lieu of tithes in kind. (b) The non-payment of ecclesiastical dues, *e. g. surplice fees*. (c) For *spoliation*, *i. e.* for injuries done by one clerk to another in taking the fruits of his benefice under some pretended title. [Note, however, that the Ecclesiastical Courts have no jurisdiction if the right of patronage comes into question; nor if a clerk, *without any colour of title*, ejects another from his benefice, for here the remedy is in the temporal Courts.] (d) For *dilapidations*, a kind of ecclesiastical waste, for which redress can be had either in these or the temporal Courts. (e) For neglect in repairing the church or churchyard, and the like.

[Note that no proceeding can now be taken to compel the payment of a *church rate*, for all such rates are made voluntary by 31 & 32 Vict. c. 109.]

*As to the Method of Proceedings in these Ecclesiastical Courts:—*

- (a) These proceedings combine the mixture of the principles and practice of the canon and civil laws, corrected and modelled by the particular usages of the Courts themselves, and the interposition of the Common Law or temporal Courts.
- (b) The first step in an ecclesiastical cause is to *cite* the party injuring to appear before the Court.
- (c) The citation is followed by the plaintiff's *libel*—a formal allegation of the cause of complaint.



- (d) The defendant then *answers*, and if he denies or extenuates the charge, the *proofs* on both sides are proceeded with.
- (e) The defendant, in addition to answering, may put in what is called his *defensive allegation*—propounding circumstances in his defence to which the plaintiff must answer, and with regard to which proofs are gone into.
- (f) In connection with the *proofs*, the Court may summon any witness for examination, and direct notes of his evidence to be taken down, and this whether the witness has made an affidavit or not.
- (g) The pleadings and proofs being concluded, the judge *takes information* from counsel on both sides, considers the matter, and forms his *interlocutory decree* or *definitive sentence*.
- (h) Among other sentences which the Courts Ecclesiastical can pronounce are—(i) that of *suspension*; (ii) that of *deprivation*; (iii) that of *excommunication*.

The above are the principal of the various inferior Courts; but the author of the Commentaries, in a footnote on p. 320, draws attention to certain other inferior Courts, the nature of which you must take notice of.

#### POINTS TO NOTE.

- I. In connection with proceedings in the sheriff's County Court what a *justices* was.
- II. What the Court of Peculiars was.
- III. What the point decided in *Gorham's case* was (*Gorham v. Bishop of Exeter*, 15 Q. B. 52).
- IV. What the Court of Delegates was, and when abolished as a Court of Appeal in ecclesiastical cases.
- V. What the High Commission Court was, and when abolished.
- VI. What the present law as to excommunication decrees is.
- VII. What Ecclesiastical Courts have jurisdiction respecting seats and pews in churches.
- VIII. What some of the principal statutory enactments relating to borough Courts of Record are. (See p. 295 *es seq.*)
- IX. What you know of the following Courts:—(a) The Court of Great Sessions in Wales; (b) The Palace Court at Westminster; (c) The Court of Piedpoudre; (d) The Forest Courts; (e) The Court of Policies of Assurance.

## Chapter V.—Of the Supreme Court of Judicature.

## ,, VI.—Of the Ultimate Courts of Appeal.

## REMARKS.

It seems desirable to consider these two Chapters together, and to help you to understand them, I propose to give you a list of the various Courts which existed prior to the Judicature Acts coming into operation, and then to endeavour to explain the effect of these Acts on those Courts.

To proceed—

- I. The Court of Common Pleas.—This was the first Court which was detached from the Aula Regis. This Aula Regis, or King's Court, followed the king as he moved from place to place in the kingdom; and suitors, of course, had to follow the Court in which they had to sue. This proving a great inconvenience to suitors, it was provided by the Magna Charta that the Court of Common Pleas should be established in some fixed place (eventually at Westminster) for determining disputes between subject and subject, especially with regard to land. In these matters it at first had an exclusive jurisdiction, but in course of time the other Courts (which were subsequently also established at Westminster) obtained concurrent jurisdiction; and the only matters in which the Court of Common Pleas had sole jurisdiction, at the time of its becoming merged in the High Court of Justice, were as to actions of *dower* and *quare impedit*; questions relating to acknowledgments by married women; appeals from revising barristers' courts, and questions arising out of election petitions.
- II. The Court of Exchequer.—This Court was also a part of the old Aula Regis, and was established by William the Conqueror to regulate the revenues of the Crown, and to recover the king's debts and duties. In course of time, by means of a fiction, the plaintiff alleging that he was a debtor of the king, and that he required the defendant's money to satisfy the king's debts, this Court was resorted to as an ordinary Court of justice between subject and subject, and as having concurrent jurisdiction with the Common Pleas Court in such matters. In addition to its common law and revenue jurisdiction, this Court

formerly had jurisdiction in equity matters; but the equity side of the Exchequer was abolished in 1841. The Court of Exchequer seems to have been permanently fixed at Westminster in Henry III.'s reign.

III. The Court of Queen's Bench.—This was the remnant of the Aula Regis, in which the sovereign used formerly to sit as chief judge.

[NOTE.—If the sovereign is a king, the Court is known as the King's Bench. During the Commonwealth the Court was styled the "Upper Bench." The last king who sat personally in the Court appears to have been James I.]

After the civil business and the revenue business had been taken away from the King's Court, the principal jurisdiction which was left to it was over criminal matters; but it had also a superintending jurisdiction over all inferior tribunals throughout the kingdom, with power either to remove proceedings from such tribunals into its own Court by writ of *certiorari* (see *post*, p. 290), or to command them to do their duty by writ of *mandamus* (see *post*, p. 288). This Court soon, by means of a fiction, obtained concurrent jurisdiction with the Common Pleas in civil matters between subject and subject, which it continued to exercise until the Judicature Acts came into force. Appeals from these three Courts (the parent of them all being, as you will notice, the old Aula Regis) lay to the Court of *Exchequer Chamber*, and thence to the House of Lords.

The jurisdiction of these three Courts is now vested in the Queen's Bench Division of the High Court, and exercised by the judges of that Division.

IV. The Court of Chancery (now represented by the Chancery Division of the High Court) was presided over by the *Chancellor* (hence its name), and had two sides: one, the legal Court, for cancelling letters patent when made against law, for issuing original suits, commissions of the peace, &c.; and the other—and by far the more important—the Court of Equity. In this Court of Equity a large portion of our law was administered under the technical term "Equity," as distinct from the common law and its doctrines; and it is necessary that you should read very carefully what appears in the Commentaries, so as to gain some fair idea of how it

happened that law and equity became to be administered in different Courts in this country. A few words will assist you on this difficult subject. The origin of Equity jurisdiction as opposed to the common law jurisdiction, was in part derived from the power originally vested in the Chancellor, to devise and issue original writs to the Courts of Common Law, and to the fact that the latter Courts considered themselves bound to follow these writs strictly; and a failure to do complete justice would have occurred had not the Court of Chancery interfered to remedy defects arising from this strict course; but the origin of Equity is mainly traced to the jurisdiction which the Court assumed over that large class of transactions introduced in the reign of Edward III., and known as uses, up to the Statute of Uses, and afterwards as trusts, and which were not recognized by the Courts of Law; and to the introduction of the writ of *subpœna* by Lord Chancellor Waltham, to obtain a discovery by oath from the defendant, the feoffee to uses, and make him account to the plaintiff, the *cestui que use*. And to these cases the *subpœna* was at first limited; but in course of time, and by means of fictions, it was extended to transactions of which the Courts of Law did take cognizance; and in the reign of Edward VI. proceedings in Chancery were regularly commenced by *bill* and *subpœna*, and the Court of Chancery was recognized as a distinct Court, to give relief in cases in which there was no appropriate relief to be had in the Courts of Law. The Court's jurisdiction was, however, very unsettled for a long time, during which its jurisdiction may be said to have been wide or limited, varying with each Chancellor's idea of justice; and it was not until Lord Bacon's time that the practice of the Court was reduced into something like a regular system. Lord Bacon was followed by Heneage Finch (Earl of Nottingham), who, in the course of his nine years' chancellorship, built up in the Court of Chancery a system of jurisprudence and jurisdiction on wide and rational foundations; and from his time, and down to the Judicature Act, 1873, coming into operation, the Court of Chancery continued to exist as a distinct Court, exercising a jurisdiction, either exclusive of, concurrent with, or auxiliary to the Courts of Common Law at Westminster. Originally

the only judge in Chancery was the Chancellor; but in course of time, as the business of the Court increased, the Master of the Rolls became a separate, though subordinate judge, and during the present century, three Vice-Chancellors have been appointed to assist in Chancery, one being appointed in 1813, and two in 1841; and in 1851 a further addition to the judicial force in Chancery was made by the appointment of two Lords Justices, to sit either alone, or with the Lord Chancellor, in the Court of Appeal in Chancery (referred to below).

- V.—The Court of Admiralty.—A Court of great antiquity, having jurisdiction to try and determine all *maritime* causes, *i. e.* injuries committed on the high seas; and, in *times of war*, on questions relating to prize of war and booty of war. The jurisdiction of this Court is now vested in the Probate, Divorce and Admiralty Division of the High Court.
- VI. The Court of Probate.—A Court of comparatively recent date, it having been established in 1857, by the Probate Act, to exercise the jurisdiction formerly exercised by the Ecclesiastical Court over wills, as you will remember from Volume II. of the Commentaries. The jurisdiction of this Court is now vested in the Probate, Divorce and Admiralty Division.
- VII. The Court of Divorce.—Another Court of comparatively recent date, it having also been established in the year 1857, by the Divorce Act, to exercise the jurisdiction in matrimonial matters formerly exercised by the Ecclesiastical Courts, as you will remember from Volume II. of the Commentaries. The jurisdiction of this Court is now vested in the Probate, Divorce and Admiralty Division.
- VIII. The Court of Bankruptcy, established in 1831, and remodelled by subsequent statutes, having jurisdiction over the estates of insolvent living persons.
- IX. The Chancery Courts of Lancaster and of Durham, having equitable jurisdiction in those counties.
- X. The Common Pleas Court of Lancaster and of Durham, having common law jurisdiction in those counties.
- XI. The Courts of Assize, the origin and history of which you must read carefully.

- XII. The Court of Exchequer Chamber.—A Court of Appeal in common law matters. Appeals lying to it from Courts Nos. 1, 2, 3, 10, and 11, above.
- XIII. The Court of Appeal in Chancery.—Also a Court with appellate jurisdiction, hearing appeals from Courts Nos. 4, 8, and 9, above.
- XIV. The Full Court of Divorce, with jurisdiction to hear appeals from Courts Nos. 6 and 7, above.
- XV. The Judicial Committee of the Privy Council, with jurisdiction to hear the following appeals:—
- (a) Admiralty appeals, *i. e.* from Court No. 5 above;
  - (b) Appeals from the Channel Isles, and all English Courts abroad;
  - (c) Appeals in lunacy matters;
  - (d) Appeals in ecclesiastical matters.
- XVI. The House of Lords.—The ultimate Court of Appeal in all common law, chancery, bankruptcy, probate, and matrimonial matters. In other words, appeals from all the above Courts.

These were the Courts, in addition to the inferior Courts considered in the last Chapter, which were in existence at the time when the Judicature Acts, 1873 and 1875, came into operation (*i. e.* 1st November, 1875), and it remains for me to add the effect of these Acts, and of the Appellate Jurisdiction Act, 1876, on these Courts, and I will endeavour to do this as shortly as possible.

One of the main objects of the Judicature Acts was to amalgamate the existing Courts, and establish one single Court, in which suitors might redress their injuries and enforce their rights, and this object was carried out by the establishment of "The Supreme Court of Judicature," representing to a great extent the *Aula Regis* of old. This Court is divided into two great branches, namely:—

- (A.) The High Court of Justice, to which is transferred all the jurisdiction formerly possessed by Courts Nos. 1, 2, 3, 4, 5, 6, 7, 10, and 11, above. The Court was originally subdivided into five divisions, namely:—(1) The Chancery Division; (2) The Queen's Bench Division; (3) The Common Pleas Division; (4) The Exchequer Division; (5) The Probate, Divorce, and Admiralty Division; but by an Order in Council, made in January, 1881, the three Common Law Divisions, *i. e.* Nos. 2, 3, and 4, were united and consolidated into one Division,

called the Queen's Bench Division; and at the present time the High Court of Justice is composed of three Divisions only, namely (1) The Chancery Division; (2) The Queen's Bench Division; (3) The Probate, Divorce, and Admiralty Division.

- (B.) The Court of Appeal, to which is transferred all the jurisdiction formerly possessed by Courts Nos. 12, 13, and 14, above; and so much of Court No. 15 as relates to admiralty and lunacy matters (a and c), and also appeals from the Stannaries Courts, as shown in the last Chapter. This Court is composed of six (three under the Act of 1873, increased to six by the Act of 1876) *ordinary* judges, who are constantly engaged in the Court, and formerly of five *ex officio* judges of the High Court of Justice, who occasionally, in important matters, sit in the Court of Appeal. The five *ex officio* judges were—the Lord Chancellor; the Lord Chief Justice of England; the Master of the Rolls; the Lord Chief Justice of the Common Pleas; and the Lord Chief Baron of the Exchequer; but now the Master of the Rolls has been transferred to the Court of Appeal, as one of the ordinary judges, and the offices of Lord Chief Justice of the Common Pleas and of the Lord Chief Baron have been abolished, and there are now only three *ex officio* judges, namely, the Lord Chancellor, the Lord Chief Justice of England, and the President of the Probate, Divorce, and Admiralty Division, who was added as an *ex officio* judge by the Supreme Court of Judicature Act, 1881.

From this you will see that the jurisdiction of Court No. 8 (Bankruptcy Court); and of No. 9 (Chancery Courts of Lancaster and Durham), and of No. 16 (House of Lords), and a portion of the jurisdiction of No. 15 (The Judicial Committee of the Privy Council) has not been transferred either to the Court of Appeal or to the High Court of Justice; and the question is, is their jurisdiction gone, or do they still, notwithstanding the Judicature Acts, exist as distinct tribunals? In answering the question let us take each Court separately.

No. VIII. The Court of Bankruptcy.—This Court remains distinct, for although, by the Act of 1873, its jurisdiction was transferred to the High Court of Justice, by the Act of 1875, the provision transferring it was altered, and it still exists as a distinct Court, appeals from it lying to the Court of Appeal.

No. IX. The Chancery Courts of Lancaster and Durham.—These still exist as distinct Courts, although the jurisdiction of the Common Pleas Courts of Lancaster and Durham has been transferred to the High Court, and appeal from them lies to the Court of Appeal.

No. XV. The Judicial Committee of the Privy Council.—This Committee still exists as a Court of Appeal, and has jurisdiction in ecclesiastical cases, and appeals from our Courts abroad, but, as shown above, its jurisdiction in admiralty and lunacy appeals is gone.

No. XVI. The House of Lords.—The appellate jurisdiction of the House of Lords was taken away by the Judicature Act, 1873, but the operation of the provision abolishing it was postponed by the Act of 1875; and by the Appellate Jurisdiction Act, 1876, the jurisdiction of the House of Lords to hear appeals from the Court of Appeal in England, and the Superior Courts of Scotland and Ireland—a very ancient jurisdiction—is restored. Some important alterations in connection with the House of Lords as an ultimate Court of Appeal were, however, made by the Act of 1876, to which it will be well to draw your attention; they are:—

(a) No appeal is to be heard unless there are present not less than three “lords of appeal,” *i. e.* three of the following persons:—the Lord Chancellor; the lords of appeal in ordinary (two judges who have been appointed to sit in the House of Lords, on the hearing of appeals, as life peers), and such peers as have held high judicial offices (*i. e.* been Lord Chancellor, or paid member of the Judicial Committee, judge of the Supreme Court of Judicature, or of one of the Superior Courts of Scotland or Ireland).

(b) Appeals can be heard during prorogation and dissolution of parliament.

#### POINTS TO NOTE.

- I. How the office of chancellor in England is created, and what its nature and authority is.



- II. Who in early days usually held the office of chancellor, and what his chief judicial work was.
- III. By what chancellors the practice of the Court of Chancery was reduced into something like a system.
- IV. What the Courts of Assize and *Nisi Prius* are, and what the origin of the term *nisi prius* is.
- V. By what different commissions judges on circuit sit.
- VI. What the following terms mean :—*Petty Bag* and *Hanaper* offices, *officia justitiæ*, *crits of association*.
- VII. How the House of Lords acquired appellate jurisdiction in common law and chancery cases respectively.
- VIII. In what cases no appeal lies to the House of Lords.
- IX. What you know of the history connected with the office of the Master of the Rolls.
- X. What exclusive jurisdiction was formerly vested in the following Courts—
  - (a) The Court of Queen's Bench; (b) The Court of Common Pleas; (c) The Court of Exchequer.

And whether or not the same jurisdiction is now assigned to each corresponding division of the High Court.
- XI. How far the Judicature Acts, 1873 and 1875, and the Appellate Jurisdiction Act, 1876, have affected the jurisdiction of the House of Lords, and of the Judicial Committee of the Privy Council.
- XII. What laws are adopted by the Maritime Courts.
- XIII. What the Admiralty rule is in actions for collisions when both ships are in fault, and how far, if at all, this rule is affected by the Judicature Act, 1873 (see s. 25).
- XIV. To what Court formerly appeals in admiralty cases lay, and to what Court such appeals now lie.
- XV. What the nature of the following Courts respectively is :—
  - (a) The Court of the Duchy Chamber of Lancaster; (b) The Barmote Courts; (c) The Cinque Port Courts.

## TEST PAPER TO WORK OUT.

1. Into what two species are wrongs divisible? Distinguish each kind.
2. Enumerate the various cases for which a self-remedy exists.
3. Define "distress," and state the manner in which distresses are disposed of.
4. A. and B. are executors and also creditors of C. A., as executor, has money paid to him. Would you advise him that he could pay himself to the prejudice of B., or would B. be entitled to share with him the money received? Would there be any difference in your answer if B. had not proved the will?
5. Define a "Court," and distinguish clearly "Courts of record" and "Courts not of record."
6. In what cases may a plaintiff safely commence his proceedings, either in the County Court or in the High Court?
7. Trace as shortly as you can the history of the Court of Chancery.
8. Give a list of goods privileged from distress, distinguishing those which are absolutely from those partially privileged.

## Eleventh Week's Work.

CHAPTER VII.—*Of Civil Injuries and their Remedy.*

„ VIII.—*Of the different Species of Civil Injuries and their Remedies.*

„ IX.—*Of Equity in its Relation to Law.*

„ X.—*Of the Limitation of Actions.*

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Chapter VII.—*Of Civil Injuries and their Remedy.*

## REMARKS.

As you will remember from a previous Chapter (*ante*, p. 213), every person who has suffered an injury, has by our law a remedy provided for him, and the author of the Commentaries tells you that the plain natural remedy for every species of wrong is "to be put into possession of that right of which the injured party has been deprived," and this remedy, as has been already shown, can sometimes be had by *private redress*, as in recaption, distress, entry, arbitration, &c., and is sometimes

afforded by mere *operation of law*, as in remitter and retainer; but the usual way in which all *civil injuries* (and by this term you will understand wrongs committed between subject and subject, and not wrongs between the Crown and the subject, for those latter generally amount to *crimes*, and are treated of in Book VI. of the Commentaries) are redressed is by *action*, a process by which a man's lawful rights are enforced and his wrongs redressed.

Actions are divided into—

- (a) *Real actions*, or those in which the *demandant* (plaintiff) seeks to recover specific lands, tenements, and hereditaments.
- (b) *Mixed actions*, or those in which some real property is demanded, together with damages for some wrong sustained.
- (c) *Personal actions*, or those in which the recovery of some debt or personal chattel, or damages for some injury to property, real or personal, is sought.

Real and mixed actions may be considered together. And since 1833 have embraced only:—

- I. *Right of dower*.—An action brought by a widow to enforce her unassigned portion of dower (part having been assigned).
- II. *Dower*.—Action brought by widow for her dower in cases where no part assignment has been made.
- III. *Quare impedit*.—Action brought to recover the presentation to a benefice, the right in respect of which has been wrongfully disturbed. These three actions were, as you will remember, within the special jurisdiction of the Common Pleas (see (*ante*, p. 229), and now of the Queen's Bench Division of the High Court.
- IV. *Ejectment*.—Action brought to recover lands or tenements unlawfully withheld.

In 1860 the first three were converted into personal actions by 23 & 24 Vict. c. 126, and consequently the action of ejectment alone remains.

All other actions are personal, and are divided into—

Actions *ex contractu*, founded on breach of some contract, express or implied, and consisting of—

- (i) *Debt*—to recover a debt or sum certain, whether due by specialty or simple contract.

- (ii) *Covenant*—to recover unliquidated damages for breach of promise in a deed.
- (iii) *Assumpsit*—to recover unliquidated damages for breach of some simple contract. (Other forms, now obsolete, were actions of *account* and *annuity*.)

Actions *ex delicto*, *i. e.* founded on some tort or wrong committed either by way of misfeasance, malfeasance or non-feasance, and consisting of—

- (i) *Trespass*—to recover damages for some injury to the person or property, accompanied *with* immediate violence.
- (ii) *Trespass on the case*—to recover damages for injury to the person or property *without* immediate violence.
- (iii) *Trover*—to recover damages for the wrongful conversion of property.
- (iv) *Detinue*—to recover chattels personal unlawfully *detained* and damages for detention.
- (v) *Replevin* —to recover chattels personal unlawfully *taken*. Limited practically to goods wrongfully taken under a distress.

You will observe that all these forms of action are of a limited nature, except trespass on the case, an action which lies for every species of tort not falling within one of the other forms.

Some other general points in connection with actions for you to remember are—

- (a) Actions founded on some cause which might have happened anywhere are called *transitory*, and when the cause could only have happened in a particular place they are called *local*; thus personal actions are generally transitory; real actions local.
- (b) Whether the action is transitory or local the plaintiff may now, under the Judicature Orders, have his action tried in which county he pleases, subject to the defendant's right to apply to have the place of trial (or "venue," as it is technically called) changed. Formerly, if the action was local, the trial must have taken place where the cause of action arose.
- (c) A loss without the infringement of some legal right (*damnum absque injuriâ*) is not actionable; but the infringement of

a right, although unaccompanied with loss (*injuria sine damno*), is actionable.

[Note the example given on p. 376.]

- (d) The damages claimed must not be *too remote*—in other words, the damage sustained must flow naturally from the injury committed.

[Note the example given on p. 377.]

- (e) Sometimes the plaintiff only recovers *nominal* damages.

[Note the example given on p. 377.]

- (f) Actions of contract may be brought not only by and against the contracting parties, but also, if the cause of action survive, by and against the personal representatives or the trustee in bankruptcy of the parties after their decease or bankruptcy.

- (g) Actions of tort, on the contrary, are said to *die with the person* (*actio personalis (injuriarum) moritur cum personâ*); so that the death of the wrongdoer, or of the person wronged, before an action for the wrong was brought, destroyed the right of action by or against the executors of the deceased. Several statutory exceptions to this rule have been made, which you must notice particularly. They may be thus summed up—

(i) An action may be brought by the executor for injuries done *to* the *personal* estate of the deceased (4 Edw. III. c. 7).

(ii) An action may be brought by the executor or administrator for injuries done *to* the real estate of the deceased (3 & 4 Will. IV. c. 42).

[Note.—The injury to be actionable must have been committed within six months before the death, and the action brought within one year after the death.]

(iii) An action lies *against* the executor or administrator for injuries done *by* the deceased to the property (real or personal) of another (3 & 4 Will. IV. c. 42).

[Note.—The injury must have been committed within six months *before* the death, and the action must be brought within six months after the executor or administrator has taken upon himself the administration.]

(iv) An action lies *by* the executor or administrator for injuries which caused the death of the deceased (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95).

[N.B.—Actions under these Acts (which are commonly

known as Lord Campbell's Act and Amendment) must be brought within *one* year of the death. If the executor does not bring the action within six months, the persons interested in the damages to be recovered may bring it themselves. Damages under this Act can only be given for some *pecuniary* loss (present or future), caused by the death and not as a *solatium* for the feelings, and are distributable among the husband or wife, children, grandchildren, stepchildren, parent, grandparent, and step-parent of the deceased in such shares as the jury may award. The action lies although the death may have occurred from circumstances making the cause of it a felony. It is under the provisions of this Act that actions lie for deaths caused by railway accidents. Before the Act, the curious anomaly existed that if a person was injured only he had a right of action for damages for the injury, while if he died from the effect of the injury, no action lay by his representatives, and it *pecuniarily* paid a railway company to kill a number of persons right out in an accident rather than maim them only !]

**Chapter VIII.—Of the different Species of Civil Injuries and their Remedies.**

REMARKS.

This is a very important Chapter for your purpose. Civil injuries may be committed either to *personal rights*, *rights of property*, or to *rights in private relations*. Taking these in their order:—

- I. Injuries to Personal Rights occur when either the right of *personal security*, or the right of *personal liberty*, is interfered with. Injuries affecting personal security are injuries to *life*, *limbs*, *body*, *health*, and *reputation*. If life is affected, there is (except under Lord Campbell's Act referred to in the last Chapter, *ante*, p. 240) no civil remedy, for a person depriving another of his life must be punished criminally; but the other injuries referred to as interfering with the right of personal security are the subject of a civil remedy for damages. Injuries to the *limbs* or *body* consist of:—

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(a) *Threats*.—There must be both menace and inconvenience in order that threats may be actionable.

(b) *Assault*.—Offering or attempting to beat a man.

(c) *Battery*.—Actually beating a man.

(d) *Wounding*.—Giving a dangerous hurt.

(e) *Mayhem*.—Depriving a person of some fighting member.

(f) An injury arising from *negligence*—*e. g.* injury caused by the bite of a savage dog. The owner is liable in damages if he knew that the dog was savage. The knowledge of the servant is the knowledge of the master for this purpose, and evidence that the dog has bitten some one else before is sufficient evidence against the owner as to his scienter. [N.B.—If a dog bites “sheep” or “cattle,” no scienter need be proved.]

[Note.—In cases (b), (c), (d) and (e) criminal proceedings to punish the wrongdoer may be taken in addition to civil proceedings if the wrong was committed on an unlawful occasion. In cases of *assault* and *battery* a plea of justification may be pleaded to the action, if the defendant’s act consisted in moderately chastising his child, scholar, or apprentice; or if it was committed in self-defence, or in the performance of a duty, as when a churchwarden or beadle turns a disturber out of church.]

Injuries to *health* arise where one man sustains damage in his vigour or constitution by the unwholesome practices of another; *e. g.* a tradesman selling unwholesome provisions, a chemist supplying unwholesome drugs, or a surgeon unskilfully experimenting on a patient, are all liable to an action for damages.

Injuries to *reputation* consist of:—

(a) *Slander*.—A malicious defamation by word of mouth, exposing a man to public hatred, ridicule or contempt.

(b) *Libel*.—This is slander made public by writing, pictures, print or representations.

[N.B.—The main differences between libel and slander are:—

(i) Slander is oral, and therefore fleeting; libel is written, &c., and therefore permanent.

(ii) Libel is punishable criminally as well as civilly; slander is not, except in some few cases.

(iii) In libel, special damage need not be proved; in slander, except in certain cases, it must be.

(iv) Actions of libel can be brought within six years; but slander within two years only.]

The right of personal liberty is invaded by *false imprisonment*, and the remedy which the injured person has for this injury is of a two-fold nature; *first*, to obtain by means of a writ of *habeas corpus* (if necessary), a release from the imprisonment; and *secondly*, to recover damages for his loss of time and liberty from the wrongdoer.

Any restraint, with show of force or authority, suffices to constitute false imprisonment, but there must be the *detention*, and the detention must be *unlawful*.

II. Injuries to Property Rights.—These may be either to (a) *real property* or (b) *personal property*.

Injuries to real property consist of:—

(a) *Ouster*.—Arising where a man has been wrongfully dispossessed of hereditaments (corporeal or incorporeal). The dispossession may be either of the *freehold*, when it is effected by (i) *Abatement*, *e. g.* if A. dies intestate, and before B., his heir, enters on his land, C., a stranger, enters and holds possession; (ii) *Intrusion*, *e. g.* if A. is tenant for life, and B. tenant in remainder, and on A.'s death, and before B. enters, C. does so and holds possession; (iii) *Disseisin*, entering on lands and turning the rightful owner out of possession; (iv) *De forcement*, *e. g.* if A. is tenant for a term of years, and he holds over after his term expires and refuses to deliver up possession; (v) *Discontinuance*, an injury formerly arising under a feoffment made tortiously by a tenant in tail, but never now occurring since 8 & 9 Vict. c. 106 was passed, one of the provisions of that statute being that in future a feoffment should not have any tortious operation.

Ouster of chattels real is termed *amotion of possession*. (You will remember from Volume I., that not only tenants for years under a lease, but also tenants by *elegit*, *statute staple*, or *recognizance*, are deemed to have chattel interests in land, or to be tenants of chattels real as it is termed, so that if any of these persons are wrongfully turned out before the term expires, or the debt is paid, the injury is termed *ouster*.)

You will observe that the author of the Commentaries explains very fully the former remedies for *ouster*, and you will further notice that the remedies differed according to the nature of the *ouster*. It is hardly necessary for you to go into these old remedies, as they have no



practical importance at present ; and it will suffice for your purpose to know what the present remedies are, and you will bear in mind that they are the same, whether the ouster be of the freehold or of chattels real, and consist of *either* peaceable entry on the land, if this is possible, as explained in a prior Chapter (see *ante*, p. 214), or an action of ejectment brought in the proper Court to obtain possession and obtain damages for the wrongful withholding, technically called *mesne profits*.

[But note that ejectment does not lie unless the claimant has the right of entry, and therefore it does not lie for dower, nor, as a rule, in respect of ouster of an incorporeal hereditament. The remedy for dower, you will remember, is by a particular action (see *ante*, p. 238), and for ouster of incorporeal hereditaments is by personal action for damages, except for tithes, for which ejectment lies, and for disturbance of rights of presentation, for which a particular action—*quare impedit*—lies.]

(b) *Trespass to land* (or, as it is called, *trespass quare clausum fregit*), arising in every case where an unwarrantable entry on to another man's land, either personally or by a man's servants or cattle, or by throwing rubbish on to the land. The plaintiff must have the actual possession of the land.

[Note the cases in which a trespass is justifiable, given in p. 415, and bear in mind that if a man abuses an authority given him by the law, he becomes a trespasser *ab initio*, just as if the law had given him no authority. Thus if a traveller enters an inn, as the law allows him to do, and becomes riotous and disorderly, or is otherwise guilty of *misfeasance*, he becomes a trespasser, and proceedings may be had against him, just as if the entry had been illegal ; but mere nonfeasance does not create a trespass. Thus if a traveller refused to pay for wine he had ordered, he would not be a trespasser, and misfeasance on the part of a landlord in carrying out his distress—an authority given him by the law—does not now make him a trespasser, 11 Geo. 2, c. 19, having enacted to the contrary.]

(c) *Nuisance* (*nocumentum*, or annoyance), or anything that worketh hurt, inconvenience or damage. Nuisances may be either *public* or *private* ; public if they affect the public generally,—private if they affect some individual or class of individuals only. This Chapter deals with private nuisances only, which are defined as “anything

done to the hurt or annoyance of the lands, tenements, or hereditaments of another not amounting to a trespass." The nuisance may be to *corporeal* hereditaments—*e. g.* erecting a building overhanging another man's house, or a spout throwing out water on another's land or house, or erecting a pig-stye, or setting up a tallow chandler's or tanner's business in the neighbourhood of houses. So, too, if a man excavates his own land and so causes the downfall of a house which has been standing for twenty years this is a nuisance, for which an action lies; for although the act is in itself perfectly lawful, yet as by it another man is injured, an action lies; for every man must so use his own property as not to hurt another person's. Or the nuisance may be to *incorporeal* hereditaments,—*e. g.* stopping, diverting, polluting, or sensibly diminishing water to the flow of which another person has a right, or stopping up a right of way, interfering with fairs, markets, ferries and the like.

The remedies for nuisances are—

- (1) By *abatement*, as shown in a previous Chapter (*ante*, p. 214);
- (2) By action for damages for the injury sustained;
- (3) By action for an injunction to prevent the repetition or continuance of the nuisance.

(d) *Waste* (or *vastum*)—arising when a tenant for life or years does any act whereby a lasting injury is done to the inheritance. It may be *voluntary*, arising from acts of commission,—as where the tenant pulls down the building, cuts timber, and the like; or *permissive*, arising from acts of *omission*,—as where the tenant neglects to repair. You must remember that waste can only be committed by a person having a limited interest in the property; for if he is tenant in fee, whether in fee simple or fee tail, he may do what he likes with the premises, and cannot be punished for waste. There are three classes of tenants who, although having only limited interests in the property, can commit all waste they like with impunity, provided they do not pull down the family mansion, cut ornamental timber, grub up an ancient wood, or plough up the park surrounding the mansion,—acts of a malicious, extravagant, and humorsome nature, which the Court of Chancery would not allow them to commit, and which were therefore termed "equitable waste." These three persons are—tenants for life *without impeachment for waste*; tenants in fee, with an executory gift over (*e. g.* a devise to A., an infant, and his heirs, and if he die under twenty-one, to B.

and his heirs—here A. is tenant in fee, with an executory gift over); and a tenant in tail after possibility of issue extinct. Prior to the Judicature Act, 1873, these persons were at law in the same position as tenants in fee simple or fee tail,—that is, they could commit what waste they pleased; but equity interfered to prevent the acts I have mentioned; and by the Act of 1873, the law is to recognize the equitable rule. (See hereon *post*, p. 255.)

The remedies for waste are an action for damages, and for an injunction to prevent its commission, repetition, or continuance; but the damage done must be something more than nominal to enable the plaintiff to recover.

(e) *Subtraction*—arising when any person, who owes any suit or service, withdraws or neglects to perform it. Services usually rendered are—(1) *Faalty*; (2) *Suit of Court*; (3) *Rent*; and (4) *Customary service*. For the first two the remedy is distress only; for the third distress and action; and for the fourth—which generally consists of doing suit to another's mill, that is, persons of a particular place having their corn ground at a certain mill by virtue of some custom existing time out of mind—by action for damages.

(f) *Disturbance*—arising where the owner of an incorporeal hereditament is wrongfully obstructed in its exercise or enjoyment. There are five sorts mentioned, namely—

- (1) *Disturbance of franchise*,—as when a man is disturbed in the lawful exercise of keeping a fair or market, taking toll, seizing waifs, &c., the remedy being by action for damages, or, in the case of non-payment of toll, distress or action.
- (2) *Disturbance of common*.—This may happen in any of the following ways:—(i) A stranger putting in beasts on the common, or a commoner putting in uncommonable beasts. The remedy here is by either lord or any commoner driving them off or distraining them, or by an action for damages by the commoner. (ii) A commoner *surcharging*; that is, putting on more beasts than he is entitled to pasture. The remedy is by distress or action of trespass by the lord, or by action on the case by any commoner. (iii) The owner or other person inclosing the land by fences, or driving the cattle off it, or ploughing up the land, and thus precluding the commoner from the benefit of what by law he is entitled to. The remedy is by action for damages, or, in the case

of the erection of a fence, the self-remedy of abatement—viz., to knock the fence down—exists.

- (3) *Disturbance of ways*—occurring where a right of way is obstructed by inclosures or other obstacles, or by the ploughing up of the land. The remedy is by action on the case for damages, or by abating the obstruction, or obtaining an injunction against the commission, continuance or repetition of it, as the case may be.
- (4) *Disturbance of tenure*—occurring where a landlord is deprived of his tenant through the wrongful act of some third person. The remedy is action on the case against the wrongdoer.
- (5) *Disturbance of patronage*—occurring where the patron is hindered or obstructed in the presentation of his clerk to the benefice. The remedy is by action of *quare impedit*, commenced in the Queen's Bench Division of the High Court of Justice. The plaintiff in the action is the *patron*, and he asks redress for the injury done to his property by the bishop delaying or refusing to admit his clerk. The defendant in the action may be one of three persons, viz., the *ordinary* (and if the delay arise from his act alone, he will be sole defendant), the *pseudo-patron* (*i. e.* the pretended patron who has claimed the right to present, and by whose claim the proceedings have really been occasioned), and his *clerk*. When the right to present is set up by some third person, then, as you will notice from the Commentaries, p. 432, it is advisable to make all these three persons defendants in the action of *quare impedit*.

Thus much for injuries to *real* property.

Next as to Injuries to Personal Property. You will remember from Volume II. that personal chattels are divided into things (or choses) in possession, and things (or choses) in action; and a man may sustain an injury as well to his chose in action as to his chose in possession, and first as to the latter injuries, namely—

- (a) *Injuries to things in possession*—consisting of either depriving a man of the possession of the thing itself, or abusing or damaging it while it remains in his possession, and these injuries are treated of under four heads; and first—

- (1) A man sustains an injury when his goods are *unlawfully taken* from him. The proper remedy here is *replevin*, in which restitution of the goods can be obtained, and damages for the wrong done in taking them away granted. In practice, however, *replevin* is limited to goods wrongfully taken under a distress, and in other cases of unlawful taking the remedy resorted to is an action for damages, and the form of action may be either *trespass*, or *trover and conversion*. (Vide *infra*.)
- (2) A man sustains an injury to his chose in possession if another, who may have come lawfully into possession of the chattel, unlawfully detains it. Thus, I may lend you my horse for a week, your possession of it for the week will be lawful, but if at the end of the week you refuse to return it to me, your detention of it is unlawful, and I sustain an injury for which I have a legal remedy, and my remedy is either *detinue*, or *trover and conversion*. You must notice carefully the distinctions between these forms of actions. In *detinue*, the thing itself, or its value, with damages for the detention, can be recovered, and formerly the defendant had the right to keep the chattel on paying its value; but now, by the Common Law Procedure Act, 1854, the judge may order the goods detained to be delivered up, and until delivery, that the sheriff distrain the defendant's goods. (See p. 442.) So formerly in *detinue*, the defendant could resort to *wager of the law*,—i. e. free himself from the plaintiff's claim by denying it, and bringing eleven of his neighbours into Court to swear that they believed his denial true. This serious disadvantage to plaintiffs in *detinue* continued until 1833, when the absurd doctrine was abolished by 3 & 4 Will. IV. c. 42, s. 13.  
*In trover and conversion*, the plaintiff does not seek the goods themselves, but their value and damages for the detention. The gist of the action originally was the *finding* (hence the term from the French, *trouver*, to find), and the action only lay when the defendant had actually found the goods and refused to give them up, but in course of time it was resorted to in other cases of unlawful detention, and now the gist of the action is not the *finding* (for it lies, no matter how the

defendant came into possession of the goods, whether lawfully (by finding or otherwise) or unlawfully), but the *conversion* : and to prove conversion, the plaintiff should, before action brought, demand the return of the goods, and the defendant's non-compliance with his demand will be evidence of the conversion. Wager of law could not be resorted to in trover, and hence this form of action was far more commonly used up to 1833 than *detinue*.

[NOTE.—In trover the plaintiff must be prepared to prove—

(i) That he has the right to the immediate possession of the goods (whether he has the right of property in them or not) ; (ii) That the defendant has wrongfully *converted* them to his use ; and (iii) The value of the goods.]

- (3) A man sustains an injury to his chose in possession in various other ways than wrongful *taking* or *detainer*, *e. g.*, by being induced to part with the chose, or doing any act by reason of some fraudulent representation made to him. The remedy is action on the case for damages, and the plaintiff must be prepared to show—(a) that the representation was false and that to the knowledge of the defendant, or at any rate that the defendant had no reason for believing what he stated to be true ; (b) that the plaintiff was misled by it ; and (c) that he suffered damage. Generally, false representations are actionable, although verbal only ; but in one case, namely, where the fraud consists in inducing a person to supply goods or money to a third person by making a false representation that such third person is of good character or credit, no action lies, unless the representation was reduced into writing and signed by the party to be charged, as required by Lord Tenterden's Act (9 Geo. IV. c. 14).
- (4) A man sustains an injury to his chose in possession if any one abuses or damages it. As, by a stranger pursuing his cattle, shooting his dogs, pirating his copyright, or infringing his patent right. The remedy is by action for damages in all cases, and in the last two cases mentioned (injuries to copyright and patent right), as well by injunction to prevent the injury being committed, repeated or continued.

Thus much for injuries to things in possession. The next injuries considered are :—

(b) *Injuries to things or choses in action, or injuries arising out of contract.* The violation of a contract is known generally as a breach of contract, for which an action lies, and the form of action differs, as you will remember (see *ante*, p. 238), according to whether the contract was under seal (a specialty contract), or was not under seal (a simple contract), and also whether the damages claimed are liquidated and fixed, or unliquidated and have to be fixed by a jury or the Court. If the damages are fixed, then, whether the claim arises out of a specialty or a simple contract, the action is said to be *debt*; while, on the other hand, if the damages are unliquidated, then the form of action differs according to whether the contract was under seal or not, for if under seal, the action is an action of *covenant*, and if not under seal it is an action of *assumpsit*, or, as it is called sometimes, an action on the *promises*. Bearing these facts in mind, you will have no difficulty in understanding the nature of the remedies for the various injuries relating to contracts or choses in action, of which the Commentaries treat, viz., for *breach of covenant in leases*; for *sale of goods* (note here that in addition to obtaining damages for non-delivery of goods sold, the plaintiff can, under 19 & 20 Vict. c. 97, obtain delivery of the goods themselves); for *breach of bailment contract* (note here the various remedies, viz., *detinue*, *trover*, *assumpsit* (promises), or on the case for negligence); for *breach of contracts relating to money*; for breach of *partnership contracts* (note carefully the cases in which an action at law by one partner against another partner lies, and bear in mind that in other cases the remedy is exclusively in equity (Chancery Division) for an account); for breach of *contract of guarantee* (see *ante*, p. 118, as to the rights of a surety who pays the debt guaranteed); for breach of a contract in the nature of a *bond* (note here that the penalty named in a bond cannot, as a rule, be recovered, but only damages in accordance with the injury sustained; see *ante*, p. 120); for breach of contract on *bills of exchange* or *promissory notes*, on *policies of insurance* and on *charter-parties*.

You must notice what appears in the Commentaries, pp. 450, 451, as to sums due on judgments and penal statutes, and bear in mind that when an action on a penal statute is taken by a private person he is called a *common informer*, and the action is a *qui tam* action.

Thus much for injuries to personal rights and rights to property (real and personal). The third great class of injuries considered are:—

### III. Injuries affecting a man in his private relations. And first—

(a) As between *husband and wife*. A man can suffer injuries as a *husband* for things done to or respecting his wife, and these injuries are principally *three*, viz. :—

- (1) *Abduction* of the wife, arising either by fraud and persuasion or open violence. The husband's remedy is by action of trespass (*de uxore raptâ et abductâ*) for damages (not for the restoring of the possession of his wife).

[NOTE that the person guilty is also liable to imprisonment and fine, under 3 Edw. III. c. 13, at the Crown's pleasure.]

- (2) *Adultery*, committed with his wife by some third person. This is not a criminal offence by our laws, but, up to 1857, the guilty party was liable to an action of *criminal conversation*, at the husband's suit, for damages; but this action does not now exist, and the husband, if he wishes for damages, must take proceedings for a divorce from his wife, and make the guilty party a co-respondent to the suit, and claim damages against him for the wrong sustained.

- (3) *Beating*, or other *maltreatment*, of the wife by some third person. Here an action for damages lies, but it must generally be brought by husband and wife *jointly*—the wife, being the meritorious cause of the action, must be made a co-plaintiff, except in those cases where the injury committed is so enormous that the husband is deprived for the time of his wife's company and assistance, when an action by the husband alone for damages for loss of her society lies.

(b) As between *guardian and ward*. A guardian can maintain an action of trespass (in the nature of ravishment) for damages sustained by the stealing or ravishing away of his ward, but the damages obtained do not, as they did under the guardianship in chivalry, abolished by 12 Car. II. c. 24 (see *ante*, pp. 16, 17), belong to the guardian, the plaintiff in the action, for he must account for them to his ward.

[NOTE.—This action is rarely used, for the reason given in the Commentaries, see p. 455].

(c) As between *master and servant*. A master can maintain an action for damages against any person who causes him the loss of the services of his servant, by either inducing the servant to leave his



master before the proper time, or by confining, beating, or disabling the servant, and thus rendering him unable or unfit to perform the services he has undertaken. The master has also a right of action against the servant, if he is wilfully guilty of non-performance of his work, and the servant, as well as the master, has a right of action against a stranger for any maltreatment received. A parent is considered as a master for the purposes of bringing an action for the seduction of his child, if he can show that the child was of some service to him—the slightest service suffices (*e. g.* pouring out his tea), or indeed if he can show that the daughter might have rendered him service. But the relationship of parent does not of itself, without this *loss of service*, enable a parent to bring an action for any injury done to the child. An action may be brought on behalf of the child by the father as *next friend*, but the damages will belong to the child; and here you must remember, that in the case of seduction of a daughter the father may bring an action for damages for loss of service caused by the seduction, but he can bring no successful action as the next friend of his daughter, the plaintiff in such a case, for the law does not consider the daughter has suffered an injury, as she was a willing party, the maxim being *Volenti non fit injuria* (no injury occurs to the willing party).

Two points more only remain to be noticed in this Chapter, and they are:—

- (1) That while the husband, the guardian, and the master (the superiors), have a right of action for injuries done to the wife, the ward, or the servant respectively (the inferiors), the latter have no right of action, however much they may be injured or inconvenienced, for injuries done to the former, for the inferior hath no kind of property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss. (See p. 457.)
- (2) That while injuries to *public rights* are generally redressed by criminal proceedings being taken against the wrongdoer, and not by civil proceedings for damages, yet there are cases in which a civil action at the suit of a private individual for such injuries lies; *e. g.* an obstruction of a highway, or the refusal by the returning officer at an election of the vote of a duly-registered voter, and this although it

turns out, as it did in the leading case of *Ashby v. White* (Ld. Raym. 938; Smith's Leading Cases in Common Law), that no actual damage was occasioned by the refusal, as the person for whom the voter wished to vote was duly elected.

## POINTS TO NOTE.

- I. In connection with the law of libel and slander, what the following expressions mean :—*scandalum magnatum*, *slander of title*, *privileged communication*.
- II. Whether or not a plea of truth, if substantiated, is a good answer to a civil action for libel or slander.
- III. In what cases of slander special damage need not be proved.
- IV. What the present rule is, and what the former rule was, as to the effect of a plea of truth in a criminal proceeding for libel.
- V. Whether or not a successful action will lie for imputing want of chastity to a woman without proof of special damage. Whether there is any peculiar custom in the City of London or Bristol on the subject.
- VI. What the effect, in actions for libel or slander, an apology made before action pleaded in a defence is.
- VII. Whether or not an action for slander lies against a witness who swears falsely in some legal proceeding, and thereby causes one of the parties damage.
- VIII. What the duties of the judge and jury respectively are, at the trial of an action for libel, when the defence is that the communication was privileged.
- IX. Whether or not any redress can be had for a malicious prosecution, and if so, what the plaintiff must be prepared to prove.
- X. What an action of *formedon* was.
- XI. What some of the principal changes, effected in real actions by 3 & 4 Will. IV. c. 27, were.
- XII. A tenant enters into a general covenant to repair; the premises are burnt down by accidental fire; whether or not he will be bound to rebuild, and whether there would be any difference if the fire happened by act of God (*e.g.* lightning) or by negligence of the tenant.
- XIII. In order to maintain an action for a nuisance to a market or fair caused by the defendant setting up another market or fair, what the plaintiff must be prepared to prove.

- XIV. What trees constitute "timber."
- XV. What the writ of *estrepement* was, and by what statute given.
- XVI. What additional remedy in cases of waste was afforded in Chancery.
- XVII. In connection with disturbance of *patronage*, what the following terms mean :—*plenarty, jus patronatus, duplex querela*.
- XVIII. What the common (or money) counts are.
- XIX. What exception to the rule, that no action by an inferior for injury done to a superior, was created by 9 & 10 Vict. c. 93.
- XX. In connection with these injuries to superiors, what the old remedy by a proceeding known as an *appeal* was.

#### Chapter IX.—Of Equity in its Relation to Law.

##### REMARKS.

The injuries treated of in the last Chapter were those for which redress was obtained, prior to the Judicature Act, 1873, in the Common Law Courts at Westminster. The injuries treated of in this Chapter are those for which redress was, prior to the Judicature Act, 1873, obtained only in the Court of Chancery.

The object of the Judicature Act, 1873, was to fuse the systems of law and equity, and make all injuries, whether of a legal or equitable nature, capable of redress in the same Court, namely, the Supreme Court of Judicature, established by the Act in lieu of the old Courts, which were by it abolished.

You must not, however, imagine that all the distinctions between law and equity are now gone, for practically those matters which, prior to the Judicature Act, were dealt with in the Court of Chancery, are now dealt with in the Chancery Division of the High Court, and the matters formerly dealt within the Common Law Courts, are now dealt with in the Queen's Bench Division of that Court. The distinctions between law and equity still, to a certain extent, existing, it is necessary for you to understand in what the distinctions consist; and although the present Chapter does not go very far into the subject, yet it contains sufficient to give you an insight into the principles of equity, and to make you wish to go more deeply into it, as you will have to when your work for the Final commences; and your careful attention to the contents of this Chapter is very necessary for

your present purpose, namely, that of passing the Intermediate Examination.

The author of the Commentaries first warns you from falling into the popular notion that, prior to the Judicature Act, 1873, law and equity were entirely opposed to one another. He lays down several rules to convince you of the error of such a notion (popular notions are generally erroneous), and to these rules I would particularly draw your attention. From them you will gather that although originally, before the jurisdiction of the Courts was settled, there was a great conflict and difference of opinion between the Courts of Law and Equity, owing no doubt from jealousy, and a fear of loss of business, and, therefore, dignity, on the part of the Courts of Law, and from a desire to gain business on the part of the Court of Chancery; yet that, in course of time, these jealousies and disputes were settled, and each Court had its special jurisdiction, and the rules of the Courts of Common Law and Equity upon the law of property, of evidence, construction of documents, the interpretation of statutes, and the necessity of following earlier decisions, were, at the time of the passing of the Judicature Act, 1873, and had for a very long time before been, absolutely the same. The reason that the business of the Court of Chancery increased so amazingly may, in almost every case, be traced to the fact, not that there was no relief at law, but that the legal relief was inadequate or inappropriate, and the Court of Chancery either took upon itself jurisdiction to interfere to give adequate relief, or exercised such jurisdiction under the power conferred upon it by some statute.

To say that there were no distinctions between law and equity would, however, be going a great deal too far; distinctions there were, and important ones. Thus, many of the rules of law and equity on certain points differed; examples of these rules are afforded by section 25 of the Judicature Act, 1873, the object of this section being to do away with the distinction, and make the former equitable rule the legal rule as well. [N.B.—The provisions of this section are most important, and I particularly draw your attention to them; they are set out on pp. 467, 468.]

But the three main distinctions between law and equity were, and to a great extent still are—(1) The matters over which they exercised jurisdiction; (2) The kind of relief administered; (3) The method of procedure they observed. With regard to the first distinction:—

(1) The matters over which the different Courts had jurisdiction. The various kinds of injuries redressed by the Common Law Courts were detailed in the last Chapter; those which the Court of Chancery redressed were very numerous, and comprised all injuries which required redress, and for which no relief, or no adequate relief, could be obtained at law. The principal matters, however, were those which are now, by sect. 34 of the Judicature Act, 1873, transferred to the Chancery Division of the High Court, viz. :—

1. Administration of the estates of deceased persons;
2. Dissolution of partnership, or the taking of partnership or other accounts;
3. Redemption or foreclosure of mortgages;
4. Raising of portions, or other charges on land;
5. Sale and distribution of the proceeds of property subject to any lien or charge;
6. Execution of trusts, charitable or private;
7. Rectification, or setting aside, or cancellation of deeds or other written instruments;
8. Specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.
9. Partition or sale of real estate;
10. Wardship of infants, and the care of infants' estates;
11. All causes and matters commenced under any Act of Parliament, by which exclusive jurisdiction is given to the Court of Chancery, or any judge or judges thereof.

[This last includes a very great many matters: Applications under the various Trustee Acts; Infants' Marriage Settlement Act; Leases and Sales of Settled Estates Act; Lands Clauses Act; Vendor and Purchaser Act, 1874; Married Women's Property Act, 1870; and many others.]

The second distinction is as to—

(2) The kind of relief administered. This at law was generally in damages, but in Equity such relief was given as the nature of the case required. Of many remedies afforded in Equity, four kinds only are mentioned in the Commentaries, and taking these in their order (see page 471) the first is—

1. *When Equity protects and enforces the Execution of Trusts.*—You will remember from Volume I., Chapter IX., that a trust,

when used in the sense of an interest, now signifies the beneficial interest in property, as distinguished from the legal or possessory ownership, and that the person entitled to the trust is called the *cestui que trust*, and the person in whom the legal ownership is vested is called the *trustee*. In the event of the trustee not carrying out the duties imposed upon and accepted by him, the *cestui que trust* had no remedy at law; but Equity affords a remedy, and compels the trustee to perform his duties, *e. g.* to account for money received, to sell the property, to make proper investments, to account for all profits, and make good all losses. And various other remedies are afforded by Equity to *cestuis que trust*—persons who are peculiarly favoured in Equity—owing to the fact that they are without remedy at law.

It is important that you should bear in mind the following powers conferred on trustees by statute law :

- (a) The right to pay the trust money into Court, or rather into the Bank of England, with the privity of the paymaster-general, in all cases of real doubt as to whom it belongs, and leave the persons to petition the Court to get it out. (10 & 11 Vict. c. 91; 12 & 13 Vict. c. 74.)

[N.B.—Trustees generally have only a joint authority, and all must join in acts done in the trusts; but under these statutes the *major* part of the trustees may pay the money into Court. The Act applies equally to executors, administrators, and other persons having money in their hands belonging to others *upon any trust*, and is, by section 25 of the Judicature Act, 1873, particularly, made applicable to persons who receive notice of assignments of choses in action, and are doubtful to whom the money should be paid.]

- (b) Lord St. Leonards' Act (22 & 23 Vict. c. 35), as amended by 23 & 24 Vict. c. 38, confers on trustees the following powers and rights:—(i) It enables them to apply summarily for a judge's advice as to the management and administration of the trust, and, acting on the advice, to be free from responsibility. (ii) It incorporates in every trust instrument the usual indemnity and reimbursement clauses. [N.B.—Notwithstanding these clauses, one trustee is always answerable

for his co-trustees' acts and defaults in Equity, unless he was clearly free from all blame.] (iii) It confers on trustees important rights of investments.

(c) The Conveyancing Act, 1881 (44 & 45 Vict. c. 145), gives trustees (*inter alia*) the following powers:—

(i) *When a power of sale is expressly given to them by the trust instrument, to sell by public or private contract together, or in lots, and buy in or rescind any contract for sale, and resell without liability for loss, with full power to convey the property;*

(ii) *To apply the income of property which they hold for infants for their maintenance and education;*

(iii) *Under certain circumstances, to appoint new trustees;*

(iv) *To give receipts for all moneys payable to them, exonerating the persons paying from seeing to the application of their money.*

The Act, the provisions of which can be excluded, repeals a portion of Lord Cranworth's Act, under which similar though not so extensive powers were conferred.

2. *When Equity enforces the specific Performance of Contracts.*—

Here Equity's remedy was often most beneficial. The legal remedy for all breaches of contract was, as you will remember from the last Chapter, in damages—a remedy in some cases wholly insufficient to compensate the injured party, and in those cases in which the remedy in damages was insufficient, Equity compelled specific performance—that is, ordered the party to carry out his contract. Contracts for the sale of personal chattels were not ordinarily enforced in Equity, as damages would generally compensate; but contracts for the sale and purchase of land were always (and are still) proper subjects for specific performance, for the Court considers that although the purchaser might buy other lands, yet the lands purchased may have some peculiar value to the purchaser, owing to their locality or otherwise, which other lands would not possess; and therefore the Court will not allow a vendor of lands, in the absence of good reason, to withdraw from a contract for the sale of lands, and as the remedy in Equity must always be mutual, the vendor has a similar right against the purchaser to com-

pel him to complete. Immediately a contract for the sale of lands is entered into and signed, as required by sect. 4 of the Statute of Frauds, the vendor becomes a trustee of the lands for the purchaser, and the purchaser a trustee of the money for the vendor; and therefore, in enforcing specific performance, Equity may be said to be in reality merely *enforcing a trust*.

[N.B.—A power was conferred on the Courts of Common Law to grant specific performance by the Common Law Procedure Act, 1854, but as it only applies to contracts comprising some public duty, and not to private contracts, the power was of but little practical use. Now, by the Judicature Act, 1873, the right to grant a *mandamus* (that is, to enforce specific performance) is conferred on all the Divisions of the High Court by sect. 25; but specific performance of contracts of lands, including contracts for leases, being specially assigned to the Chancery Division, and these contracts being the usual ones of which specific performance is enforced, the remedy will generally be sought for in the Chancery Division.]

Before passing on, it will be useful to explain, in connection with specific performance, what is meant *by time being or not being the essence of the contract*. It was a rule of law that a time being named for the completion of a contract, if one of the parties was not ready to complete at that time, the other party might withdraw from the contract without further liability—in other words, time was at law the *essence* of the contract. In Equity, however, a different rule prevailed, and though one party was not ready to perform the contract at the exact time, if he sought to enforce specific performance within reasonable time, Equity entertained his application, unless, indeed, it had been expressly agreed that time should be the essence of the contract; or was obviously so from the nature of the property sold, *e. g.* if it was of a fluctuating value or a precarious nature. The rule at law and in Equity is now the same, the equitable rule prevailing under sect. 25 of the Judicature Act, 1873.

3. *Where Equity grants an Injunction*.—There were, prior to the



Judicature Act, 1873, two kinds of injunctions granted in Equity—viz. (i) a *common injunction*, which was granted to restrain harsh or inequitable proceedings at law; (ii) a *special injunction*, granted to prevent injurious acts being committed by the defendant in violation of the plaintiff's rights,—such as pirating his copyright, infringing his patent, committing a nuisance to his property. The former kind of injunction is abolished by the Judicature Act, 1873, sect. 24, sub-sect. 5, which in effect prevents the Chancery Division from staying proceedings in a Common Law Division; while at the same time it gives the defendant power to obtain relief in the division in which he is sued. With regard to the latter kind of injunction granted to restrain injury, a very general and full power is conferred on all the divisions of the High Court by sect. 25, sub-sect. 8 of the Judicature Act, 1873, to grant such injunction either before, at, or after the hearing, in all cases in which the Court may think just or convenient, and subject or not to conditions. The Common Law Procedure Act, 1854, conferred on Courts of Law the power to grant injunctions to prevent the *repetition* or *continuance* of any injury for which an action for damages had been brought; but as it conferred no power to grant an injunction against a *threatened* injury, and as the Court of Chancery had always been resorted to in injunctions, the Common Law Courts were seldom required to exercise the powers conferred on them.

4. *Where Equity lends its aid to perpetuate Testimony.*—Here Equity's assistance was most beneficial. The nature of it will be best illustrated by an example: A devisee under a will had no means at law, unless the heir immediately contested the validity of the will, of establishing his title,—the probate of the will in the Ecclesiastical Courts only establishing it as to the personalty. The heir might lie by and wait until the evidence in support of the due execution of the will, the sanity of the testator, and other points was lost, and then take proceedings against the devisee to upset his title under the will. Under these circumstances the

devisee was able to take proceedings in Equity "to have the will established" by examining the witnesses thereto, their evidence being taken down and filed in the Court; and then, if in the future the heir contested the will, and the witnesses were dead, their evidence in support was sufficient to prevent the will being upset. This is only an illustration, you will bear in mind. The proceedings can be taken in any case in which there is danger of losing evidence before the matter to which it relates can be made the subject of judicial investigation. A remainderman often takes these proceedings, as he is unable at once to prove his title. Formerly evidence could only be perpetuated with regard to *property*; but by Lord Cottenham's Act (5 & 6 Vict. c. 69), perpetuation of testimony is allowed in regard to *honours, titles, dignities, or offices*, as well as to all interests in property, real or personal.

As to the third distinction—

(3.) The method of procedure. This will appear in Chapter XIII., *post*.

#### POINTS TO NOTE.

- I. How the saying that Equity abates the rigour of the law is fallacious.
- II. Whether or not it was true that Courts of Law followed the strict letter and not the spirit, and that in Equity alone the spirit was observed.
- III. Whether Equity's jurisdiction in *accident, mistake, and fraud* was exclusive of or concurrent with that of the Courts of Law.
- IV. The same question as to *trusts*.
- V. Explain the maxim "Equity follows the law," and how far the maxim is affected by sect. 25 of the Judicature Act, 1873.

#### Chapter X.—Of the Limitation of Actions.

##### REMARKS.

Equally important with the last two Chapters is the present Chapter, which shows you the time within which various actions

must be brought under the provisions of the so-called "Statutes of Limitation,"—statutes which have been passed "to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for an injury committed at any distance of time." (See p. 488.) These statutes are also based on the rule that a supine claimant who has slept on his rights is not to be assisted, the maxim being "*vigilantibus non dormientibus jura subveniunt*"—to the watchful and not to the sleepy do the laws come.

In order the better to enable you to remember the times in which different actions must be brought, I append a table giving you the necessary information; but first, I would draw your attention to one or two important points for you to remember.

(a) The Statutes of Limitation relating to real property bar not only the remedy but also any rights possessed by the claimant; while the statutes relating to personal property bar the *remedy* only, and not any right. Thus, if a watchmaker has repaired a watch he must bring his action for the repairs within six years, and if he does not do so his remedy to enforce payment of the repairs by action is gone; if, however, the watchmaker had retained the watch, on which the law gives him a lien, the fact that his debt was statute-barred would not prevent him retaining the watch until the debt was paid, though it would be otherwise if his action, which was barred, had been a real action.

(b) In cases of disability in action brought to recover land, rent, or legacies, a certain additional time is allowed after the disability ceases; whereas in actions having reference strictly to things personal, in cases of disability the claimant has the same time after the disability ceases as he would have had at the time of the cause of action accruing had he been under no disability.

(c) The following constitute *disabilities*, so as to prevent the Statutes of Limitation running while they last:—infancy, lunacy, or being *non compos mentis*, *coverture*, or the absence beyond the seas of the *defendant*.

[NOTE that the absence abroad of the *plaintiff* is now no longer a disability, 19 & 20 Vict. c. 97, having abolished it as a disability in actions relating to personalty, and 37 & 38 Vict. c. 57, in actions relating to realty.]

(d) The attention of students who are reading the 7th edition of the Commentaries is particularly called to the provisions of 37 & 38 Viet. c. 57 (The Real Property Limitation Act, 1874), which is not noticed therein, and which came into force on the 1st January, 1879. It cuts down the period for bringing actions to recover land, rent, and legacies from twenty to twelve years, and substitutes six years, after disability ceases, for ten years, and makes the outside period for bringing real actions, whether there is disability or not, thirty, instead of forty, years.

(e) Statute-barred *debts* may be revived and made actionable by—

(i) A written acknowledgment of the debt signed by the party to be charged, containing an *unconditional* promise to pay, or, if the promise is conditional, the plaintiff in bringing the action must prove that the condition has been performed; (ii) Part-payment of the debt, or payment of any interest thereon.

[N.B.—Acknowledgment of a statute-barred debt, or part-payment thereof, or payment of interest thereon, by one of several co-debtors or co-contractors, does not revive the debt as against the others.]

(f) To prevent the Statute of Limitations running against a debt (or to *save* the statute, as the phrase is), a claimant may issue a writ of summons and keep the claim alive by renewing the writ from time to time until he can serve the defendant. By doing this, the time will cease to run against him from the issue of the writ of summons.

(g) The Statutes of Limitation do not run against *express trusts*, unless the trust comes within the provisions of sect. 10 of the Real Property Limitation Act, 1874, which provides that “after 1st January, 1879, no proceeding shall be brought for any sum or legacy charged on land or rent and *secured by express trust*, or for arrears of rent or interest in respect of such sum or legacy, or damages in respect of such arrears, *except within the same time as if there were no express trust.*”

(h) So the Statutes of Limitation do not run in cases of *concealed* fraud until after the fraud is discovered, or might have been discovered by using due diligence, nor does Equity allow the claims of charities to be barred by these statutes.

## LIMITATION OF ACTIONS.

Subject-matter of Action.	Time for bringing Action.
By Crown for lands or hereditaments (except liberties or franchises), or for the profits thereof.	60 years (9 Geo. 3, c. 16).
Ditto by Duke of Cornwall (H. R. H. the Prince of Wales).	60 years (23 & 24 Vict. c. 53).
Dower .....	12 years, but only 6 years' arrears can be recovered (3 & 4 Will. 4, c. 27).
Adowsons .....	3 successive adverse incumbencies, or such further period as will make up 60 years, not to exceed 100 years in all (3 & 4 Will. 4, c. 27).
Debt for rent upon any indenture of demise, or of covenant or debt, or any bond or other specialty, or debt or <i>scire facias</i> , upon recognizance.	20 years; in case of disability same period after removal (3 & 4 Will. 4, c. 42).
Share of the personal estate of an intestate ..	20 years after right to receive same accruing to person capable of giving discharge for same, or after part-payment or acknowledgment (23 & 24 Vict. c. 38).
Land or rent, mortgage-money or judgment debt, or any sum charged upon any land or rent, or any legacy or share of residue under a will.	12 years. In case of disability 6 years are allowed after disability ceases, but the action must be brought within 30 years. [N.B.—The times in these cases were formerly respectively 20, 10, and 40 years. The alteration was effected by 37 & 38 Vict. c. 57, which came into operation on the 1st Jan., 1879.]
Foreclosure or redemption of mortgaged estates.	12 years (37 & 38 Vict. c. 57). [N.B.—There is no extra time allowed for disability in these cases. (See <i>Kinsman v. Rouse</i> , 50 L. J., Ch. and <i>Forster v. Paterson</i> , 50 L. J., Ch.)
Tithes .....	6 years (55 Geo. 3, c. 127).
Upon the case (except for slander), account, trespass, detinue, trover, replevin, debt (without specialty), debt for arrears of rent and trespass <i>quare clausum fregit</i> , fines on copyholds, escape.	6 years; in case of disability same period after removal (21 Jac. 1, c. 16).
Trespass for assault, battery, wounding and imprisonment	4 years; in case of disability same period after removal (21 Jac. 1, c. 16).
Verbal slander .....	2 years; in case of disability same period after removal (21 Jac. 1, c. 16).
On penal statutes—By Crown .....	2 years.
By common informer ....	1 year.
Trespass or case by the personal representatives of a deceased person for injury to his <i>real</i> estate committed within 6 calendar months before his death; or for injury causing death under Lord Campbell's Act.	1 year from death (3 & 4 Will. 4, c. 42, and 9 & 10 Vict. c. 93).
Infringement of copyright .....	1 year (5 & 6 Vict. c. 45).

Subject-matter of Action.	Time for bringing Action.
Trespass or case <i>against</i> the personal representative of a deceased person for any wrong done by him, within 6 calendar months before his death, to the <i>real or personal</i> estate of another.	6 calendar months after representatives have taken upon themselves administration (3 & 4 Will. 4, c. 42).
Against magistrates for some act done by them in the exercise of their jurisdiction.	6 calendar months (11 & 12 Vict. c. 44; 3 months if a stipendiary magistrate; 2 & 3 Vict. c. 71).

## TEST PAPER TO WORK OUT.

1. Define "an action." To what divisions are actions subject?
2. Distinguish clearly (a) trespass, and trespass on the case; (b) trover and detinue; (c) transitory and local actions; (d) libel and slander.
3. Give the exceptions to the maxim "personal actions of tort die with the person."
4. Give fully the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), and discuss its effect on the former law.
5. What are the three ways in which one man may injure another's reputation?
6. Distinguish in connection with ouster (a) abatement and intrusion; (b) disseisin and deforcement.
7. *Why* is it that a servant cannot bring an action for injuries caused to his master?
8. What are the four kinds of relief afforded in equity.
9. Under what circumstances does equity allow testimony to be perpetuated? And how was the right extended by 5 & 6 Vict. c. 69?
10. Within what time must the following actions be brought—(a) debt; (b) covenant; (c) fraud; (d) illegal distress; (e) libel; (f) slander; (g) false imprisonment; (h) for a penalty under a statute?

## Twelfth Week's Work.

### BOOK V.

CHAPTER XI.—*Of Proceedings in an Action.*

„ XII.—*Of Motions and Incidental Proceedings, and herein of Prerogative Writs.*

„ XIII.—*Proceedings in the Chancery Division.*

„ XIV.—*Proceedings in the Probate, Divorce and Admiralty Division.*

„ XV.—*Of Proceedings affecting the Crown.*

This week's work must be carefully gone through, because it bears on subjects on which questions may very likely be put, and also because, even if a knowledge of the Chapters is not very essential for the purposes of the Intermediate, yet the subjects treated of must be thoroughly known before you go in for the Final, and the knowledge will be better acquired now than later on.

I propose to give you an epitome of each of these Chapters, as they are, perhaps, somewhat difficult to understand.

#### Chapter XI.—*Of Proceedings in an Action.*

##### REMARKS.

You will remember that the ordinary means of redressing a wrong and enforcing a right is by *action* taken in the proper Court. And now, subject to certain exceptions which will be treated of by and by, all actions under the Judicature Acts and Rules are carried on much in the same way.

These proceedings are treated of by the author of the Commentaries under six heads, each of which I will now take in their order, and the first is—

I. THE PROCESS (*i. e.*, the commencement of proceedings by which a man is brought into a temporal Court).—All actions now commence with a *writ of summons*, a letter missive from the Sovereign, calling on the defendant to enter an appearance to the action within eight days of its being served upon him. The writ must be entitled in the Division in which the action is intended to be heard, and the judge's name must also be

added in the Chancery Division, and must be *tested* in the name of the Lord Chancellor, or, if his office be vacant, in the name of the Lord Chief Justice of England. On the back of it must appear the proper *indorsements*, which may be thus divided:—

(a) *Indorsement of claim*, showing what the plaintiff is suing for. This may be either a *general* one, *e. g.* the plaintiff claims damages for libel, or it may be a *special* one, setting out precisely what the plaintiff's claim is; but this latter is only allowed when he is suing for a debt of a fixed and liquidated amount, as for the price of goods sold and delivered, or a sum due on a promissory note; this special indorsement must be followed by an indorsement as to costs, stating that if the defendant pays debt and so much for costs, within four days, all further proceedings will be stayed.

[NOTE.—The advantage of this special indorsement is *two-fold*; *first*, if the defendant does not appear, final judgment may be signed against him and execution issued without any further steps being taken in the action; *secondly*, if he does appear, the plaintiff can, if he thinks the appearance is entered for the purpose of delay only, apply under Order XIV. for an order that he be entitled to sign judgment, notwithstanding the appearance; an order he will obtain, unless the defendant is prepared to show that he has a defence on the merits, or is ready to pay the money sued for into Court.]

(b) *The indorsement of address*, showing the names and places of business of the plaintiff's solicitor, and of the London agent issuing the writ, if one, and an address for service within three miles of the Royal Courts of Justice. If issued by the plaintiff in person his name and address must appear, and also an address for service within the above radius.

(c) *The indorsement of service*, showing when the writ was served, and by whom. This must be made within three days of the service, otherwise advantage of neglect to appear (of which more directly) cannot be taken.

Further, if the plaintiff sue, or the defendant is sued, in a representative capacity, *e. g.* as executor or trustee, this fact must also appear as an indorsement.

Not only is it necessary to take care to have the writ properly in-



dorsed, but also to see that the proper persons are made plaintiffs and defendants to the action, and the present rule as to who may be made parties to actions is a very wide one, viz., "that all persons *in* whom or *against* whom the right to relief is alleged to exist, whether jointly, severally, or in the alternative, may be made parties to an action." This rule is followed by others which, in effect, provide that if any persons are wrongly joined, or improperly omitted, the *misjoinder* or *nonjoinder* is not fatal to the action, as formerly, but the necessary amendment may be made by adding or striking out names as the case requires, subject, of course, to the payment of such costs as the judge may order, and subject to the rule that no one may be added as plaintiff without his consent.

The writ, being properly indorsed and the parties being properly selected, is *issued* by being sealed by the proper officer. The place of issue is either London or one of the district registries established under the Judicature provisions for the convenience of country suitors.

The next step is to *serve* the defendant with a copy of the writ, producing the original if he asks to see it; owing to the fact that a defendant served with a writ can insist on seeing the original writ, if he likes, it is desirable, when there are several defendants, or if only one, when it is not known where he is, to issue *concurrent* writs, or *duplicate originals* as they are termed.

[N.B.—From this you will gather that the object of issuing *concurrent writs* is to facilitate service.]

The service must be effected within a year of the date of the writ being issued, for writs are only in force for twelve months, and if within this time the service cannot be effected, the writ must, in order to keep it alive, before its expiring, be *renewed*; this renewal, which can only now be made by leave of the judge, lasts for six months, but may be repeated every six months, on leave being obtained, till service can be effected.

[NOTE.—The object of renewing writs is to prevent the Statute of Limitations running against the claim. See *ante*, p. 263.]

The service of a writ should be *personal* on the defendant or on his solicitor, if the latter agrees to accept service *and enters an appearance*; but if the plaintiff cannot effect "prompt personal service," he can obtain an order for "substituted service," *i. e.* allowing him to serve it on some one else (*e. g.* the wife of the defendant), or to send it through the post.

The next step is the defendant's *appearance* (note the origin of this term, p. 505) to the action, by his filing a memorandum giving the necessary information in the proper office, and by then giving notice of his appearance to the plaintiff. [NOTE.—This notice is required in all actions now, under Rules, April, 1880.]

In *default of appearance* by the defendant, the plaintiff, in common law actions, signs judgment, interlocutory or final, as the case may be, *i. e.* according to whether the claim is for a liquidated amount or for unliquidated damages; thus, if the claim is for a debt, final judgment could be signed, but if for unliquidated damages, interlocutory judgment only could be signed, and the damages would have to be assessed by a jury on a *writ of inquiry* before the sheriff; or if the damages are a mere question of calculation, then on an order of reference before a master or referee, and ultimately final judgment signed for the amount found due.

Should the defendant show an inclination, as he sometimes does at this stage of the action, to go abroad to avoid the plaintiff's claim, the plaintiff can obtain an order, corresponding to the old writ *to hold to bail*, and the Chancery writ of *ne exeat regno*, that he be arrested for six months, or until he give satisfactory security not to leave England without the Court's consent. In support of his application the plaintiff must show (a) that the debt or amount claimed is 50*l.* or upwards; (b) that there is probable cause for believing that the defendant is about to go abroad; (c) that the plaintiff will be prejudiced by the defendant's absence. (This last is not necessary if the action is for a penalty arising otherwise than out of contract.)

Presuming the defendant appears to the action, we come to the second head treated of, namely:—

II. THE PLEADINGS.—“A series of mutual allegations which the parties are allowed to interchange with a view to the development of the point in controversy between them.” The Judicature Acts and Rules establish one system of pleading, framed principally from the rules before in force in the Admiralty Court; and first comes—

(a) *The statement of claim*, showing precisely, and as shortly as possible, the nature of the plaintiff's claim. It must be delivered within *six weeks* of the defendant's appearance, otherwise the defendant can obtain judgment dismissing the action for want of prosecution.

In addition to the title of the action the statement shows where the plaintiff wishes the trial to take place, and if he name no place, the trial will be laid in Middlesex, the defendant always having the right to apply for a change of venue. Next comes

(b) *The statement of defence.* This must be delivered by the defendant within eight days of the delivery of the statement of claim, and shows what defence he has to the plaintiff's claim. Default in delivering this statement subjects the defendant to judgment, final or interlocutory, as the case may be, being signed against him. The defendant may meet the action on its merits, when his defence will properly be called a *pleading*, and will be either by way of *traverse* (or denial), or by way of *confession and avoidance*. Take an example: A. sues B. for money lent, and B. says that the money never was lent him; this is a *traverse plea*; but if B. had said that it had been lent him, but that he had paid it back, or that A. had released him from the loan, this would be a plea in *confession and avoidance*. Instead of thus meeting the action on its merits, the defendant may *demur* to the statement of claim, that is, say that it shows no legal right to relief. Thus, if an action is brought against an infant for goods supplied to him (not being necessities), his proper defence would be *demurrer*, as, while admitting the contract, he says that he is under no legal obligation in respect of it, as he was an infant at the time.

The defendant's defence often takes the form of a *set-off*, or *counter-claim*, a mode of defeating the claim of the plaintiff particularly encouraged by the provisions of the Judicature Acts and Rules, under which a defendant can raise as his defence "any right or claim" he may have against the plaintiff, and for which he could bring a separate action, and thereby defeat the plaintiff's claim wholly or in part, and if there is a balance found due to the defendant, judgment may pass in his favour for the amount. The third pleading is—

(c) *The statement of reply* by the plaintiff, which he delivers within three weeks of receipt of the statement of defence. In this reply the plaintiff meets the defence, either by denying or confessing and avoiding it. After the reply no further

pleading can be put in except by leave; and when put in it has no distinctive name. The pleadings go on until an *issue* (*i. e.* a statement on one side, and a denial on the other side) is arrived at, and joinder of issue takes place, and the pleadings are closed; and this brings you to the third head, namely—

III. THE TRIAL AND EVIDENCE.—Within six weeks of the close of the pleadings the plaintiff gives the defendant notice of trial, stating the place and day of trial; and this notice also specifies in which of the various modes allowed under the Judicature Rules for the trial of actions (see *post*, p. 275), he wishes the action to be tried. Presuming that he chooses a judge and jury trial, as he usually does in common law actions,—and even if he does not, and there is a question of fact to be decided, the defendant can insist on a jury trial,—the cause is then *entered for trial*, the parties prepare their briefs, get ready their cases, subpoena their witnesses, give the necessary notices to the opposite side to produce or to inspect and admit documents, and instruct their counsel, so as to be in readiness when the cause is called on in its turn at the particular assizes or sittings for which notice of trial was given. You must now suppose the day of trial to have arrived, and that the parties are ready in Court with their counsel, solicitors, and witnesses. The case is called. The judge looks at the *Nisi prius record*, which contains a transcript or copy of the pleadings, and from which he sees what the nature of the claim is, and what defence there is to it, and thus ascertains what has to be proved by the parties; and while he is doing this, a *jury* of twelve are *called and sworn* to try the case. Each jurymen is called separately, and, if either party has any objection to his trying the case, he must *challenge* him. Challenges are of two kinds—viz. :—

(a) Challenge to the *array*—when objection is taken to the whole panel of jurymen on account of some partiality or default alleged against the sheriff who prepared it; this is a *principal challenge*, which, if proved, must be allowed; or on account of some *probable* partiality or bias,—as that the son of the sheriff married the daughter of the adverse party; and this is a *challenge to the favour*, and is at the discretion of the judge to allow it or not as he likes.

(b) Challenge to the *poll*—when objection is taken to some particular juror or jurors. And these challenges are of four kinds, viz. :—(1) *Propter honoris respectum*,—as where a lord of parliament is impannelled as a juror; (2) *Propter defectum*,—as where a female or an alien is impannelled, or where the jurymen has not the necessary qualification to act [NOTE carefully this qualification, p. 543]; (3) *Propter affectum*, for suspicion of bias or partiality,—as where a juror is of kin (within the ninth degree) to the adverse party, or is his master, servant, steward, or solicitor, or has taken money for his verdict,—these are *principal* challenges; or that there is an acquaintance between the juror and the adverse party,—this is a challenge to the *favour*; (4) *Propter delictum*,—as where a juror has been convicted of crime.

When twelve men have eventually been selected they are sworn “to well and truly try the issue between the parties, and a true verdict give according to the evidence.” The case commences by the pleadings being opened by the junior counsel for the plaintiff: that is, the junior counsel states shortly the effect of the plaintiff’s claim, and the defendant’s defence, and the proof of the case is proceeded with. The plaintiff’s case is *generally* first stated to the jury, his witnesses examined, cross- and re-examined; then the defendant’s case is put in the same way before the jury, and his counsel sums up, and the plaintiff’s counsel replies on the whole case. The judge sums up the case to the jury, drawing their attention to its leading features and crucial points. The jury consider the case, and through their foreman deliver their verdict (*i. e.* their unanimous decision on the facts referred to them), which may either be a *general* one—*i. e.* in favour of the plaintiff or defendant generally; or a *special* one—*i. e.* they find that such and such things are the facts, but being unable to say from those facts which party is entitled to their verdict leave the judge to pronounce judgment. The plaintiff must be present when the verdict is given, and, if absent, no verdict can pass, and the plaintiff is said to be *nonsuited*, and, prior to the Judicature Rules coming into force, he could commence his action over again, and, being armed with better evidence, possibly succeed; but now a judgment of *nonsuit* is equivalent to a verdict for the defendant, unless the Court otherwise orders (as it usually does). I say that *generally* the plaintiff first states his case, because it is not always so, the rule being

that "he has the right to begin on whom the burden of proof lies," or, in other words, he against whom verdict would be given if no evidence at all was adduced: and if the burden of proof lies on the defendant, then he begins,—as, for example, if the action were on a bill of exchange which the defendant indorsed to the plaintiff, and his defence is that he received no value, as the law presumes that value is given for such instruments, it lies on the defendant to prove that this was not so in the particular case, and he will consequently begin. The right to begin is an important right, as it carries with it, if witnesses are called by the other side, the right to reply, and thus the last word with the jury.

Before going further, it is necessary to go back a little and add a few words on the proof or evidence given by the parties, and the following points are important for your purpose:—

(a) Evidence is either written or parol. Written or documentary evidence consists of records, deeds, or other writings; while parol evidence is the evidence of witnesses personally appearing in the Court and deposing to what they know on the subject in question.

(b) If before the hearing a witness is likely to die or go abroad, his evidence can be taken *de bene esse*, or conditionally under a commission or before a master, and then, if he cannot attend at the trial, the evidence can be read.

(c) The evidence in common law actions has always been taken *vivâ voce* in open Court at the hearing; while in Chancery actions the evidence was nearly always taken by means of *affidavits* filed before the hearing. Now, by the Judicature Rules, the evidence in all cases is to be *vivâ voce* at the hearing, unless the parties agree (as they may) to take it by affidavit,—a course rarely adopted in common law actions.

(d) The presence of the witnesses in the case is compelled by means of writs of *subpœna* served upon them. The subpœnas may be *subpœnas ad testificandum*—*i. e.* to give evidence only; or *subpœnas duces tecum*—*i. e.* to produce documents as well.

(e) A person subpœnaed to give evidence and not appearing at the trial is liable to be attached and put in prison for contempt of Court, and is also liable in damages to the person subpœnaing him for the loss sustained by his non-attendance.

(f) Although formerly the parties themselves, persons interested in the action, although not parties, husbands or wives of parties, and

criminals, could not give evidence in civil actions, they can, and *must*, if required, now under the various Evidence Acts passed in the present reign, give evidence; but neither a husband nor a wife can be compelled to disclose any fact communicated by the one to the other during marriage.

(g) Again, although formerly a person unless he believed in a God who would punish in the next world could not be sworn as a witness, yet now, if the judge who tries the action is satisfied that an oath would have no binding effect on a witness's conscience, he may direct him to make a solemn declaration that his evidence shall be true, and if it prove false he will be subject to all the penalties of perjury. (32 & 33 Vict. c. 68.)

(h) A witness is bound to answer all questions put to him relating to the matters in dispute, unless they would subject him to some criminal prosecution or forfeiture.

(i) A counsel or solicitor witness cannot be compelled to divulge the secrets of his client; nor can official persons be compelled to disclose matter prejudicial to the community.

(j) If a witness turns out adverse to the party calling him, his evidence may be *contradicted* by showing (by leave of the judge) that he has previously made statements inconsistent with his evidence, or (without leave) by calling other witnesses.

(k) One witness is generally sufficient; but in cases of breach of promise of marriage the plaintiff's evidence must, in order to enable her (or him) to recover, be corroborated; and two witnesses to the same facts are, of course, in all cases *desirable*.

(l) The best evidence that can be had must be given; and this brings you to another division of evidence, namely, into (a) *primary*; and (b) *secondary* evidence.

(m) *Primary* evidence is the best that can be obtained. Thus primary evidence of a deed consists in production of the deed itself. All falling short of primary evidence is called *secondary*. Thus a copy or draft of a deed is secondary evidence only; and it is a rule of law that secondary evidence (of which it is said there are no degrees) can never be given until the party wishing to give it has done his utmost to produce primary evidence. Thus a copy of a deed in the possession of the other party cannot be put in, unless notice to produce it has been given, and that notice has not been complied with.

(n) Deeds and other writings may generally be proved to be

genuine by the admission of the other party. The admission of documents is obtained by the person holding them and intending to put them in evidence calling upon the other party to come and inspect and admit them.

(o) In the case of instruments, however, to which attestation is absolutely necessary (*e.g.* deeds executed under powers, conveyances under the Mortmain Act, bills of sale), the admission of the other side is not sufficient, but the attesting witness must be called to prove the execution of the instrument, and if he is dead, evidence of his death and of his handwriting must be given.

(p) *Hearsay* evidence—*i. e.* statements made out of Court by persons not parties to the action—is not generally admissible, as the person making the statement did not make it under the sanction of an oath, and was not subject to cross-examination.

(q) In the following cases, however, *hearsay* evidence is admissible:—(i) Where it formed a part of the *res gestæ* (see illustration given on p. 563); (ii) Upon questions of pedigree, custom, or boundary; (iii) Where the statement was reduced into writing, and was made either in discharge of duty or in the course of business, or was against the interest of the person making it, and in either case the person making the statement is dead; (iv) Where the plaintiff or defendant was present when the statement was made. (For reason of this, see p. 564.)

(r) If the genuineness of handwriting is disputed, it may be proved by (a) comparing it with other handwriting proved to the judge's satisfaction to be genuine; or (b) by the opinion of any person who is acquainted with the handwriting.

The other modes in which actions may be tried besides by judge and jury are—(1) By judge or judges alone; (2) By judge or judges, sitting with assessors; (3) By an official or special referee, sitting with or without assessors. (See as to these pp. 573—576.)

The fourth step is—

IV. THE JUDGMENT.—The jury having given their verdict, judgment is signed by the successful party, but before signing judgment certain steps may be taken by the party who has failed, a few words as to which must be added.

(a) The unsuccessful party may apply to a divisional Court



of the High Court for a *new trial*, and he may base his application on any one or more of the following grounds :—

- (i) That the jury has flagrantly misbehaved, *e. g.* that they tossed up for a verdict ;
- (ii) That the verdict is against the weight of evidence ;
- (iii) That the damages awarded are absurdly large or small ;
- (iv) That there was surprise ;
- (v) That the judge made some mistake in admitting or rejecting evidence, or in ruling on some point of law.

[NOTE.—This last formerly gave a new trial as of right, but not now, for the party applying must, in addition to showing the mistake of the judge, show that by it some substantial miscarriage of justice has occurred.]

If a new trial is allowed the case is heard before another jury.

[N.B.—The application for a new trial is made to the Court of Appeal if the trial took place before a judge without a jury.]

(b) The *defendant* may, when the verdict is against him, apply by motion to a divisional Court to *arrest judgment*, *i. e.* to prevent judgment being signed, on the ground that though the plaintiff has the verdict, he is not, as shown upon the face of the record, entitled to judgment. In reply, the plaintiff has the right to suggest the facts, and so remedy the defect.

(c) The *plaintiff*, when the verdict is against him, can apply to a divisional Court to be allowed to sign judgment *non obstante veredicto* (notwithstanding the defendant has the verdict), on the ground that the defendant admitted himself to be wrong, and has obtained a verdict on a pleading which did not better his case. On getting leave the defendant may enter a suggestion of facts which, if true, would remedy the defect in his pleadings.

(d) On application by either party the Court may order a *repleader* where the issue has been joined on a fact wholly immaterial or insufficient to determine the right, so that the

Court cannot know for whom judgment ought to be given. When the order is made the pleadings commence over again from the point where the first fault was made.

Eventually judgment in the action is *signed*, i. e. the successful party obtains a certificate of the fact that judgment has been given in his favour and *entered*.

This is the usual way of obtaining judgment, viz., on a *verdict*, after proceeding through the regular course of an action from beginning to end; but judgment for either party may also be more quickly obtained on *demurrer* or *special case*, and for the *plaintiff* on the defendant's *confession* (when he executes a *cognovit actionem* or *warrant of attorney*) or *default*, and for the defendant on a judgment of *nonsuit*, or *nolle prosequi*.

Judgments are either *final*, when no further step need be taken, but execution can issue at once, or *interlocutory*, when some such further step is required in order to ascertain the amount for which execution can issue. As to the mode in which damages are assessed under an interlocutory judgment, see *ante*, p. 269; and notice very particularly the course of procedure which is adopted by the sheriff under a *writ of inquiry* sent down to him. Notice also the mode in which *warrants of attorney* and *cognovits* must be executed under the Debtors Act, 1869. (See p. 587, n.)

The judgment debt must of course be paid, and to enforce payment execution against the judgment debtor's property issues.

Lastly, judgments carry interest at four per cent. per annum from the time of being entered, under 1 & 2 Vict. c. 110.

*As to the Costs of an Action.*—Prior to the Judicature Acts and Rules, the rule at common law was, that costs generally followed the event, while in the Court of Chancery, the costs were always at the discretion of the judge—a discretion generally exercised in favour of the person who, on the whole, was successful.

This remains much the same under the Judicature Acts and Rules, for costs are left to the judge's discretion; but when the trial is by jury (as usually at common law), they are to follow the event, unless for some good reason, shown at the trial, a contrary order is made. In actions, however, which can be commenced in the county court, the plaintiff, although successful in the High Court, gets no costs, unless he recover more than 20% on contract, or more than 10% in tort, or unless the judge certifies for costs; but in actions which

cannot be commenced in the county court the plaintiff gets his costs, even although he get one farthing damages only, unless the judge deprives him at the trial of his costs. (See *ante*, p. 224, as to actions not triable in the county court.)

The next subject is—

V. EXECUTION.—Generally judgment is sufficient to induce the person to do what the law has commanded him; but in some cases (where the person ordered is foolish or has no means) it is necessary to proceed further and compel observance of the judgment by execution, by means of which the debtor's property will be made applicable to meet the judgment. Execution is enforced by means of *writs*, of which there are several kinds:

1. *Fieri facias*.—This is the usual writ used to enforce a judgment for a sum of money, no matter from whom due. It commands the sheriff that of the debtor's goods "he cause to be made" (hence the writ's name) "£ —, the amount of the judgment, with interest at four pounds per centum, and that he make return the writ (with the money) to the person suing it out."

The following are some, perhaps the most important, points connected with *fi. fa.* writs:—

(a) The sheriff enters the debtor's premises in a peaceable manner; for he must not, unless the execution is at the Crown's writ, and then only after request to open, break open an *outer* door, though he may when once in break open all inner doors. The entry must be made on some *week* day.

(b) The sheriff takes with him an assistant, who makes an inventory of the goods, which are then removed and sold.

(c) The following property cannot be seized under a *fi. fa.*:—  
 (i) Bedding, wearing apparel, and tools of trade up to 5*l.*;  
 (ii) Fixtures affixed to the freehold; (iii) Roots, straw and manure, when there is a covenant that they shall be consumed on the premises, or, if seized, they must only be sold on condition that they are to be consumed by the purchaser on the premises; (iv) Goods of a stranger. [N.B.—Compare this with the things privileged from distress, *ante*, p. 215.]

(d) Before selling, the sheriff must pay to the landlord one year's arrears of rent (or if for any less term than a year, then

four terms' arrears—*e. g.* four months, or four weeks). He must also pay one year's Queen's taxes (if due).

(e) The sheriff may seize loose money and securities for money (*e. g.* bills, notes, cheques, &c.), and, if necessary, bring an action on such securities to recover the amount due upon them.

(f) If the sheriff cannot sell he makes a return to that effect, and the judgment creditor is entitled to a writ of *venditioni exponas*, which commands the sheriff to sell at all risks, and at any price.

(g) A sale by the sheriff is good against everyone; and so a sale by the debtor of the goods is binding if made *bonâ fide* at any time before the sheriff has seized, although he has the writ in his possession to execute (19 & 20 Vict. c. 97).

(h) If some third person makes claim to the possession of the goods seized, the sheriff can *interplead*—*i. e.* compel the execution creditor and the claimant to fight out the matter between themselves.

(i) If the sheriff returns that the debtor is a clergyman, and has no lay fee within his district, the creditor obtains a writ *sequestrari facias de bonis ecclesiasticis* addressed to the bishop, under which the bishop enters and sequesters the profits of the living to meet the debt, paying the parson (or some substitute for him) a certain sum for performing the services. This writ corresponds to the old writ of *levari facias*,—a writ used to obtain the rents and profits of a debtor's land prior to the lands themselves being allowed to be taken under the writ of *elegit* (to be next considered), given by 13 Edw. I. c. 18.

2. *Elegit*.—Also used to enforce judgments for payment of money. The writ was given in the year 1285, and by the statute just mentioned. It is addressed to the sheriff, and his duties under it are—

(a) First to empanel a jury, who appraise the debtor's goods (except oxen and beasts of the plough, which are not affected by the writ) and value his lands and tenements (except advowsons in gross, glebe lands, and rents seck).

(b) The sheriff then delivers the goods to the creditor at their assessed value, and if they are insufficient, delivers the

*legal*, not the *actual*, possession to the creditor, who becomes a tenant by *elegit*, and keeps possession until his debt and all costs are paid, or if he prefers he can apply to the Court for a sale of the debtor's interest in the lands (27 & 28 Vict. c. 112).

(c) Until the sheriff actually seizes, the debtor may sell his lands to a *bonâ fide* purchaser for value, whose title will be protected under 27 & 28 Vict. c. 112.

(d) Prior to 1838 only half the freehold lands could be taken under this writ, and no copyholds; but by 1 & 2 Vict. c. 110, passed in that year, the whole of the lands, tenements, and hereditaments can be taken, including copyholds and lands over which the debtor has a sole disposing power, and including also reversions and rent-charges.

3. *Distringas*.—Used to enforce the specific delivery up of goods ordered to be delivered up in an action of detainue. Under this writ the sheriff distrains the defendant's goods until the chattel ordered to be delivered is forthcoming.
4. *Possession*.—Used to enforce delivery of possession under a judgment for the recovery of land. Under this writ the sheriff enters on the land or house (if necessary, breaking open an outer door) and gives the plaintiff possession.

Other remedies open to a judgment creditor to obtain payment are by means of either (a) a *charging order*; or (b) a *garnishee order*.

(a) *A charging order*.—Suppose A. has got judgment for 100*l.* against B. B. has no goods or lands which can be seized under a *fi. fa.* or *elegit*, and he refuses to pay. A., on discovering that B. has some stock or some funds in Court standing in his name, has the right to apply to a judge for an order that the stock or funds stand *charged* with payment of the debt; and if the judgment is not met within six months from the date of the order, A. can obtain directions enabling him to sell the stock and pay himself debt and costs.

(b) *A garnishee order*.—Suppose the same case of A. having got judgment for 100*l.* against B., and that C. owes B. 50*l.*, A. can obtain an order attaching the debt due from C., and unless C. shows some good reason to the contrary, he must pay the debt to A. in part satisfaction of the judgment debt, and

if he refuses, execution at A.'s suit may issue against him.  
C. is in this case the garnishee.

The sixth and last step in an ordinary common law action is—

VI. APPEAL (this is treated of as the sixth head in the 8th ed., see p. 603).—A party dissatisfied with the judgment of the High Court may appeal to Her Majesty's Court of Appeal. The following points on the subject are useful for your purpose:—

(a) The appeal is by way of motion to the Court of Appeal, made within the proper time, and upon proper notice being given to the other side.

(b) The appeal is in the nature of a re-hearing before three judges, if from final decisions, and in other cases before two judges.

(c) One judge in the Court of Appeal has jurisdiction only to decide mere *incidental* questions respecting the appeal.

(d) The appeal does not operate as a stay of proceedings under the judgment of the Court below, unless so ordered.

(e) The Court of Appeal either confirms the decision from below or reverses it, or may order a new trial to be had. If two judges hear the appeal, and one is in favour of, and the other against, the decision below, the decision is deemed confirmed.

(f) The Court of Appeal is composed of six *ordinary* judges and five *ex officio* judges, as has been already mentioned *ante*, p. 256.

(g) Any decision may be appealed against, excepting those which are declared to be final, and excepting orders as to *costs*, and orders made by *consent*.

(h) The costs in the Courts of Appeal are at the discretion of the Court, but are almost always given to the successful party.

If dissatisfied with the decision of the Court of Appeal, either party has an ultimate appeal to the House of Lords, the appeal being by way of petition, setting out all the proceedings in the Court below, praying that the matter of the judgment appealed against may be reviewed, in order that what is right may be done in the matter.

## POINTS TO NOTE.

- I. Under what circumstances our law *terms* originated, and whether these *terms* still exist for all or any purposes or purpose.
- II. Whether the sittings in London are continuous throughout the year or not.
- III. What vacations at present exist.
- IV. How, prior to the Judicature Acts coming into operation, proceedings in the following Courts were respectively commenced:—Courts of Common Law, Court of Chancery, Admiralty Court, Court of Divorce, and Court of Probate; and how since these Acts came into force.
- V. What the regular and orderly parts of an action are.
- VI. Distinguish *mesne process* and *final process*.
- VII. With what writ, in olden days, the process of an action commenced.
- VIII. What the object of the establishment of district registries was, and how far proceedings may go on in these registries.
- IX. Whether or not, at the present time, a plaintiff can commence his action in which Division of the High Court he pleases.
- X. What the result is if the plaintiff commence his action in a wrong Division.
- XI. What the result is if, on a specially indorsed writ, the plaintiff insert too large a sum for costs.
- XII. How writs against corporations are served.
- XIII. Under what circumstances leave can be obtained to issue and serve a writ on a defendant abroad.
- XIV. What the practice was, up to 1852, when the defendant in a common law action failed to appear.
- XV. What benefit a plaintiff derives by specially indorsing his writ with a claim for an account.
- XVI. What was meant by a *special pleading*.
- XVII. What the object of the pleadings in an action is.

- XVIII. What an "issue" is, and how issues of law and fact differ.
- XIX. Distinguish (a) demurrer and defence proper, (b) dilatory and peremptory pleas, (c) pleas to the jurisdiction, and pleas of suspension.
- XX. By what other name peremptory pleas are known.
- XXI. What the "general issue" pleas were in an action of tort and contract respectively, and whether those pleas are now allowed.
- XXII. What the distinction is between (a) pleas in discharge and in justification, (b) traverse pleas, and pleas in confession and avoidance.
- XXIII. What a defence of set-off is, and under what circumstances allowed under the Judicature Acts, and to what defence under the civil law it corresponds.
- XXIV. Under what circumstances the following defences can be pleaded (a) tender, (b) payment of money into court, (c) estoppel.
- XXV. What, in connection with defences to actions, the doctrine of *colour*, express and implied, was. How affected by 15 & 16 Vict. c. 76.
- XXVI. What the plaintiff's course was prior to the Judicature Acts when the defendant misapprehended the cause of action, and what his course is under those Acts.
- XXVII. Under what circumstances the pleadings are deemed closed.
- XXVIII. Prior to the Judicature Acts, by what names the various pleadings in a common law action were known.
- XXIX. What a plea *puis darrein continuance* was, and whether there is any means provided by the Judicature Rules, by which defences arising after action brought can be pleaded as a defence.
- XXX. What causes of action cannot be joined in an action.
- XXXI. What an instance of a *demurrable* pleading would be, and what the course of procedure adopted in demurrers is.
- XXXII. What the effect of (a) a demurrer being allowed, (b) a demurrer being overruled, is.
- XXXIII. Pleadings often develop *several issues*. How this happens.



XXXIV. In Blackstone's time, what period of the year was taken up in solemn argument on points of law, and in deciding the truth of facts respectively. Whether Blackstone's remark on this holds good even now.

XXXV. What the duties of *assessors* are.

XXXVI. By what other name *trial by jury* is known.

XXXVII. What the various kinds of trial in use in Blackstone's time were.

XXXVIII. Give Blackstone's account of the origin of the trial by jury, and state what is the most probable theory of its establishment.

XXXIX. Define *trial at bar*.

XL. What length the notice of trial must be given, and by whom causes are entered for trial.

XLI. Under what circumstances actions used to be tried by the sheriff on *writ of trial*, and when this mode of trial was abolished.

XLII. What a *trial by proviso* is.

XLIII. Show how a jury trial must be far superior to every other mode of trial.

XLIV. What the course of procedure is when either party requires a *special jury*, and whether the procedure is the same in country as in London causes.

XLV. What "striking a special jury" is, and whether now allowed.

XLVI. What the course adopted is, when at the trial (a) the defendant does not appear, (b) the plaintiff does not appear.

XLVII. In what actions an order for a *view* by the jury is granted, and what the procedure under such order is.

XLVIII. What a challenge to the jury for *want of hundredors* was.

XLIX. Whether or not in civil or criminal actions the defendant, being an alien, can demand a mixed jury, *i. e.* a jury *de medietate linguæ*. What recent legislation on the point has taken place.

L. When a challenge to the array is controverted, how the question is decided.

LI. Who, in connection with challenges, "*elisors*" are.

- LII. Whether or not a judge can be challenged.
- LIII. What the qualifications of (a) common jurors, (b) special jurors, respectively are.
- LIV. What the course adopted is when there are not a sufficient number of jurors (twelve) at the trial.
- LV. Whence the terms "jury" and "jurors."
- LVI. In what actions the plaintiff begins, although the burden of proof lies on the defendant.
- LVII. What sufficient excuses are for the non-attendance at the trial by a witness who has been subpoenaed.
- LVIII. Under what circumstances a witness can refuse to give evidence.
- LIX. How the evidence of a witness abroad is obtained.
- LX. Under what circumstances affidavits made by witnesses before the hearing can be read, when there has been no agreement to take the evidence by affidavit.
- LXI. What rights of delivering interrogatories is conferred on plaintiffs and defendants by the Judicature Acts and Rules.
- LXII. What exceptions formerly existed to the rule that all persons were admissible as witnesses in an action, and what the various statutory enactments altering the rule have been made during the present reign.
- LXIII. What enactments have been made in favour of persons not liking to take an oath. Whether they extend to atheists.
- LXIV. What the object of cross-examination is.
- LXV. Whether or not the credit of a witness may be impeached by asking him questions on cross-examination as to certain acts of misconduct of his, and whether there is any difference if the acts amounted to a crime.
- LXVI. What is sufficient evidence of the fact that a witness has been convicted of some crime.
- LXVII. Instance a matter of which the Court takes judicial notice without proof.
- LXVIII. The effect of evidence may be either *positive* or *circumstantial*; what the meaning of these terms respectively is.

LXIX. What a bill of exceptions was, and what is substituted for it by the Judicature Acts.

LXX. What the advantages and excellences of *voir dire* evidence over affidavit evidence are.

LXXI. Of what the judge's summing-up consists.

LXXII. What the result is if the jury, while they are considering their verdict, eat or drink without leave, or if they speak with either of the parties.

LXXIII. What course the judge may adopt if at the assize trial the jury cannot agree.

LXXIV. With what object a juror is withdrawn, and whether after such a course a fresh action can be brought.

LXXV. What the origin of the rule requiring the plaintiff to appear in Court when the verdict was given was.

LXXVI. What the distinction between a *privy* and *public* verdict was.

LXXVII. By what Act trial of questions of fact by a judge without a jury was introduced, and whether this mode of trial can be adopted under the Judicature Acts and Rules against the wish of the defendant.

LXXVIII. What actions can, under the compulsory powers of the Common Law Procedure Act, 1854, be referred to an arbitration for decision.

LXXIX. What powers of referring matters to referees are conferred on judges of the High Court by the Judicature Act, 1873, sects. 56 and 57.

LXXX. What the distinction between official and special referees is.

LXXXI. In what manner a referee, to whom a matter is referred under the Judicature Act, holds his Court, and what his powers and duties are.

LXXXII. What the *postea* at a trial was, and what now has taken its place.

LXXXIII. If at the trial the judge does not order judgment to be entered, how the necessary order is obtained.

LXXXIV. If on the other hand the judge does order judgment, but one party thinks the judgment ordered not in accordance with the findings, whether such judgment can be set aside, and if so, by what means.

LXXXV. What the history connected with allowing new trials of common law actions is.

LXXXVI. Define "judgment."

#### Chapter XII.—Of Motions and Prerogative Writs.

##### REMARKS.

I. **MOTIONS.**—A motion is made *vidé voce* for a certain order (or rule) required. It is either made *ex parte* (*i. e.* without notice to the other side)—but this can now only be done where expressly authorized by the Judicature Rules—or on notice (two clear days) to the other side. In the former case, an order (or rule) *nisi* only is obtained, calling on the other side to show cause why the Court should not grant the order (or rule) asked for; and if good cause is shown, the order (or rule) is *discharged*, and if not, it is made *absolute*. In the latter case, the order is granted or refused out and out at the first hearing.

II. **INTERPLEADER.**—This arises where a person has goods or money in his possession in which he claims no interest whatever, and two persons claim the same from him, and he knows not to whom to pay the money or hand over the goods, and one of them brings an action against him, he can apply to the Court for an order to compel the parties to interplead, or fight the matter out between themselves without involving him in it. The application may be made either by *motion* to the Court, or it may be (and more usually is) made by *summons* at chambers, supported in either case by affidavit, showing that the defendant claims no interest in the goods, that he does not collude with either party, and that he is ready to bring the goods into Court.

The middleman must generally wait until an action is brought against him by one party, but a sheriff can, when goods which he has seized are claimed by some third person, himself originate interpleader proceedings, and compel the third person and the execution creditor to fight the matter out, without involving him therein.

III. **INTERLOCUTORY APPLICATIONS.**—These are made to the Court, or to a judge or master at chambers, for various purposes during the course of an action, and, among others, the author of the Commentaries draws attention to the fact that any party to an action may apply to the Court for the sale of goods which are of a perishable nature, or of a nature likely to injure from keeping, or which, for some other reason, had better be sold, or for an order for the detention, preservation or inspection of property the subject of an action, or for an order allowing samples to be taken or experiments made.

So a mandamus or an injunction may be granted, or a receiver appointed, in all cases in which the Court thinks it desirable.

[Note how extensive the powers to grant an injunction are. See p. 613.]

IV. **WRIT OF SCIRE FACIAS.**—A judicial writ, founded upon some record, and considered in law as an action. It lies to repeal a patent; to make members of a company liable upon judgment recovered against their public officer.

V. **WRIT OF PROCEDENDO.**—Used (a) to compel a judge of an Inferior Court to proceed to judgment when he delays doing so, (b) to order an Inferior Court to proceed with an action commenced in such Court, but removed for insufficient reasons into a higher Court.

In case (a) a mandamus is the more proper writ to apply for; this writ is the next given.

VI. **WRIT OF MANDAMUS.**—A writ commanding the doing, or abstaining from doing, a certain act. First, there is the Prerogative Writ of Mandamus, which issues out of the Queen's Bench Division, and requires some person or corporation or Inferior Court to execute a duty of a public or quasi-public nature.

The writ is obtained on motion, but there are two conditions precedent to obtaining it, viz., (1) that the duty sought to be enforced is of a public or quasi-public nature, (2) that there are no other legal means of enforcing the duty.

Secondly, there is a *mandamus incidental to an action*, commanding the defendant to do something, or abstain from

something, in respect to the subject of the action. This writ was first given by the Common Law Procedure Act, 1854, but under this Act it was of but limited application ; under sect. 25 of the Judicature Act, 1873, however, very general powers of granting a mandamus are conferred on the Court.

The third writ considered is—

- VII. WRIT OF PROHIBITION.—This writ is issued to the judge of an Inferior Court, or to the parties in a suit pending in such a Court, commanding that the proceedings be stopped. The object of the writ is to restrain the Inferior Court from exceeding its jurisdiction.

The fourth writ considered is—

- VIII. WRIT OF QUO WARRANTO.—This is granted by the Court calling on some person to show by what authority he holds a certain public office.

The applicant for the writ must show (a) that the office alleged to be usurped is a public one, (b) that he took no part in the irregular proceedings complained of, (c) that the irregular proceedings have caused substantial wrong.

The fifth writ considered is—

- IX. THE WRIT OF HABEAS CORPUS.—The most celebrated writ in the English law, by which the right of personal liberty is secured.

The most important habeas corpus writ is that known as the *habeas corpus ad subjiciendum*, used for delivering a person from illegal confinement. The writ is directed to the person detaining another in custody, and commands him to produce the body, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the Court orders.

The writ issues on application by motion, and after rule or order made thereon.

Many abuses formerly occurred in connection with the issuing of this writ of habeas corpus, and to remedy this, the Habeas Corpus Act (31 Car. II. c. 2) was passed, the provisions of which, as amended and extended by 56 Geo. III. c. 100, you must carefully get up. They are set out on pp. 632—635. Under the provisions of these statutes, complete remedy is afforded for the removal of all injuries arising from illegal imprisonment.

Lastly is considered—

**X. THE WRIT OF CERTIORARI.**—This writ is issued from the High Court to the judge or officers of any Inferior Court of Record, commanding them to return the proceedings of an action or matter therein depending, to the end that the applicant may have the more sure and speedy justice.

It is used in both civil and criminal matters.

This brings you to the end of the Chapter. There are many important points in it upon which it is impossible to enter in this Guide, and upon which it is hardly likely that the Examiners will set questions.

#### Chapter XIII.—Proceedings in the Chancery Division.

##### REMARKS.

Proceedings in the Chancery Division are regulated by the Judicature Acts and Rules, and are mainly the same as those in the Common Law Division. There are, however, owing to the peculiar class of actions tried in the Chancery Division, some material distinctions, which may perhaps be summed up as follows:—

- (a) In the Chancery Division the action is generally of an administrative nature, and requires some account to be taken, or some inquiry made, or some contract to be enforced, or some deed rectified or set aside, and does not, as in the common law Division, seek damages.
- (b) In a Chancery action, in default of appearance or default of defence, the plaintiff does not sign judgment as in a common law action, but he goes on with his action.
- (c) The evidence in Chancery is often by agreement before the hearing, taken by affidavit, instead of *vidé voce*, as at common law.
- (d) At the hearing of a Chancery action a judge sits alone, and not with a jury, as in a common law action.
- (e) The judgment in a Chancery action is generally interlocutory only, and directs certain steps to be carried out in chambers, whereas the judgment at the hearing of a common law action is final.
- (f) The ordinary mode of enforcing a judgment in a Chancery action is by writ of attachment (*i. e.* arresting the defendant) and sequestration (sequestering his property), until he clears

himself of the contempt by doing what the Court orders him, *e. g.* execute a deed, deliver up property, abstain from committing waste, and not, as at common law, by writs of execution, which would not meet the requirements in the cases given.

- (g) If the defendant is about to go abroad to evade a Chancery action he is stopped by a writ of *ne exeat regno*, instead of by an order to hold to bail; but it is now somewhat doubtful whether the order to hold to bail must not be used in all Divisions.

The following is a very brief account of the proceedings which, in a Chancery action, are carried out in chambers:—

Suppose the action to have been to foreclose a mortgage, the proceedings down to the hearing will be the usual ones, that is, the mortgagee will issue the writ indorsed with a claim for foreclosure; the defendant will appear, or in default, the plaintiff will proceed as if he had appeared; the statement of claim, defence, and reply will be delivered; issue joined; notice of trial given, and the hearing will come on in due course. The cases will be stated, the evidence given, either *vivâ voce* by the witnesses or by means of affidavits sworn before the trial, and the judge will, if the plaintiff has made out his case, give interlocutory judgment to the effect that an account be taken in chambers of what is due to the mortgagee (plaintiff) for principal, interest, and costs, and that the mortgagor (the defendant) be allowed six months, after the chief clerk's certificate finding the amount due has been made, in which to pay, and on his making default, that his equity of redemption be *foreclosed*.

The judgment is then drawn up by the registrar, and a copy of it taken to chambers, and a *summons to proceed* in the action taken out and served on the other side. The parties then appear before the chief clerk, and produce what evidence he may require; the account is taken, and the chief clerk makes his certificate, showing what he finds due to the plaintiff, which is approved by the judge and signed by him, and final judgment on the certificate is obtained by what is termed *motion for further consideration*.

An appeal lies from a Chancery Division action to the Court of Appeal, and is carried out in the manner you have already seen in appeals in common law actions, and an ultimate appeal lies from the Court of Appeal to the House of Lords.



**Chapter XIV.—Proceedings in the Probate, Divorce, and Admiralty Division.**

**REMARKS.**

No knowledge of these proceedings being *essential* for a Pass at the Final, it is hardly likely that difficult questions will be asked on them at the Intermediate, and a knowledge of the following summary will probably be sufficient for your purpose.

**I. PROBATE ACTION.**—Probate business is of two kinds—*contentious* and *non-contentious*. Of the latter, or *common form business*, Volume II. treated in the Chapter on wills and administration. Of the former, or *solemn form business*, a few points on which the proceedings differ from ordinary actions require notice.

(a) Proceedings are commenced by writ of summons, as in other cases, indorsed with a claim for probate or administration, or the recall thereof, as the case may be, and indorsed further with a statement in what character the plaintiff sues—*e. g.* as executor or next of kin, and the indorsement on the writs are verified by affidavit, which must be filed before the issuing of the writ.

(b) The proceedings then go on as in other actions, the plaintiff in his statement of claim showing specifically what he requires, and if he disputes the interest of the defendant in the estate, stating that fact also.

(c) The defendant in his defence alleges whatever defence he has against the probate or administration, or against the same being recalled, or in some cases he merely insists on having the will duly proved by examination of the witnesses, so that he may cross-examine them and obtain his costs.

(d) Anyone having an interest is, on filing an affidavit showing the interest, entitled to appear in the action.

(e) In default of appearance by the defendant the action goes on.

(f) If the action is tried before a judge only, application may be made in the Probate Court for a rehearing, or appeal lies to the Court of Appeal.

(g) If the action is tried before a judge and jury, and the judge rules wrongly in law, appeal by way of *exception* to the bad ruling lies to the Court of Appeal.

II. DIVORCE PETITION.—The proceedings in divorce and matrimonial matters go on as before the Judicature Acts, and are somewhat peculiar. The following points are worthy of notice in connection with the practice and pleading :—

(a) Proceedings commence by *petition*, setting out the facts and praying for the relief required—*e. g.* for dissolution, or for judicial separation.

[NOTE.—The prayer may be in the alternative.]

(b) The facts in the petition are verified by affidavit, and petition and affidavit are filed.

(c) Citation is served on the respondent and co-respondent (if one), and is then, with memorandum of service, filed in the registry.

(d) Appearance is entered within eight days; in default, affidavit of service of citation and of search for appearance is filed.

(e) The respondent *answers* within twenty-one days, and the answer is supported by affidavit, unless it is a mere denial of the facts.

(f) The petitioner's *replication* comes next (within fifteen days).

(g) Either party may then, within fifteen days, apply for a jury. If no application made, the judge tries the case without a jury; but if damages are claimed a jury is a *necessity*.

(h) The cause is set down and the trial comes on, and the hearing is conducted as a common law action.

(i) The evidence is generally oral, but may be by affidavit, interrogatories, or deposition.

(j) The decree in suits for a dissolution is a decree *nisi* only, and is not made absolute for six months, and during this time the status of the parties is not altered.

(k) The Queen's Proctor may, at his own instance or on the application of any person, intervene to prevent the decree being made absolute.

(l) An appeal lies first to the Court of Appeal, and thence, in certain cases, to the House of Lords. (See 44 & 45 Vict. c. 68.)

(For the various orders and decrees which can be obtained in the Divorce Court, see Vol. II. of the Commentaries, Chapter on Husband and Wife, and *ante*, pp. 169 *et seq.*)

**III. ADMIRALTY ACTIONS.**—These actions are regulated by the Judicature Acts and Rules, and actions *in personam* (*i. e.* against the person only who has caused the action) go on in much the same way as ordinary actions; but in actions *in rem* (*i. e.* against the property itself out of which the claim arises) the Judicature Rules contain some (the following among others) special provisions:—

(a) After writ of summons issued, the ship or cargo to which the action relates may be *arrested* under a warrant issued to the marshal of the Court. The warrant of arrest is issued only on the proper affidavit being filed showing the circumstances.

(b) The arrest may be stopped by the defendant causing a *careat* to be entered against it on giving bail to the action.

(c) The writ of summons is served by fixing it on the mast of the ship or on the cargo.

(d) In default of *appearance* the property may be sold; but in default of *defence* the plaintiff *delivers a conclusion*, and sets down the cause for hearing.

(e) Anyone interested may intervene and defend the action on filing an affidavit showing his interest.

(f) In actions for damage caused by collision, before delivery of the pleadings a *preliminary act*, showing the circumstances under which the collision occurred, must be filed by both parties.

(g) This preliminary act may, by consent, take the place of pleadings, and the action is thus brought speedily on to a hearing.

(h) The trial generally takes place (whether of an action *in rem* or *in personam*) before the judge alone, or with two of the Trinity Masters as assessors, and not with a jury.

(i) In case there are questions of account to be gone into, the Court does not go into them, but orders them to be taken by the registrar with the assistance of merchants.

#### Chapter XV.—Proceedings from or affecting the Crown.

##### REMARKS.

This Chapter is divided into two branches, and the first branch is—(a) The method by which a subject redresses an injury from the Crown.

It is a constitutional maxim, that "the sovereign can do no wrong," and therefore no action *eo nomine* can be brought against the Crown; but as injuries to property may be dealt to subjects through the Crown's officers, the law has provided a particular means by which redress can be obtained from the Crown, and this means is by Petition of Right, which in form is a supplication to the Crown, that it will order right to be done in regard to some particular matter which forms the subject of the suppliant's complaint.

The petition sets forth precisely the facts which entitled the suppliant to relief and it is left with the Home Secretary, and the Sovereign's fiat that "right be done in the matter" is obtained.

The petition is then left with the solicitor to the Treasury, and the case defended on its merits, or demurred to, or not answered at all, in which last case it is deemed confessed.

The further proceedings, and the rules as to costs, are the same as in actions between subject and subject.

The second branch or division of the Chapter is—

- (b) The Methods by which the Crown redresses an Injury received from a Subject.

The various methods enumerated in the Commentaries are—

- (1) By actions consistent with the royal prerogative and dignity.
- (2) By inquisition (or inquest) of office. This is an inquiry made by the sheriff, coroner, escheator, or commissioner appointed by the Crown for the purpose, respecting property, real or personal, belonging, or alleged to belong, to the Crown; the question being determined by a jury of no fixed number. For example, to inquire as to whether there was an escheat on A.'s death prior to 1870; whether A. had forfeited his lands by felony.

In some cases, the Crown is entitled to property without any "office found." (See p. 669).

- (3) By writ of *extent*, a forcible writ under which the goods and lands of the debtor may be taken at once to compel payment. This writ, however, only issues on debts of record, such as judgment debts or recognizances, and it is generally necessary before resorting to it that a *scire facias* be issued, so as

to give the debtor an opportunity to show cause why it should not issue against him.

The sheriff's duties on receiving the writ are, on the oaths of lawful men, to ascertain the lands, goods and debts of the debtor, and to seize the same into the hands of the sovereign. If the debtor disputes the debt he must enter an appearance, and proceedings go on, and the question of liability or non-liability is decided in the usual way.

The debtor's lands are bound from the date of the debt becoming one of record, but, as against *bonâ fide* purchasers or mortgagees, whether with or without notice, the lands are not bound unless a writ of execution was issued and registered before the completion of the conveyance or mortgage; and further, the Lords of the Treasury (or any three of them) may, by writing under their hands, certify that the lands be held free from all further claim on behalf of the Crown.

The debtor's *goods* and *debts* owing to him are bound from the *teste* (or date) of the writ.

- (4) By *scire facias*—to revoke some act done by the Crown in favour of a subject, *e. g.* to repeal letters patent.
- (5) By information to redress an injury done to the possessions of the Crown. The two main injuries so redressed are: (a) *Intrusion*—*i. e.* for trespass committed on the Crown lands; and (b) *Debt* arising upon breach of some penal statute.

There is also an information *in rem* when goods are supposed to become the Crown's property, and no one disputes the Crown's title or claim to the goods, as in the case of treasure trove, waifs, &c.

#### TEST PAPER TO WORK OUT.

1. What are the six regular and orderly parts of an action?
2. What is the object of (a) issuing concurrent writs of summons; (b) renewing writs of summons?
3. Distinguish (a) *primary* and *secondary* evidence; (b) *positive* and *circumstantial* evidence; (c) verbal and documentary evidence (pp. 541 *et seq.*).
4. Mention the main grounds on which a new trial can be obtained?

5. A. brings an action for breach of covenant in a lease, and recovers 15*l.* in the High Court. No order is made as to costs. Will he get the costs of the action? Would your answer be the same if the action had been for trespass?

6. What is an interpleader? Describe shortly the process to compel an interpleader.

7. Discuss the various remedies by which the Crown can redress injuries received from subjects.

8. What is a "charging order," and how obtained?

### Thirteenth Week's Work.

REVISE VOLUME II. (EXCLUDING BOOK IV.).

Follow the same plan as suggested with regard to Volume I., *ante*, p. 186, and then work out the following questions:—

#### TEST PAPER TO WORK OUT.

1. A. owes B. 100*l.* B. assigns the debt to C. Can C. sue A. in his own name and recover the 100*l.* Has the rule of law on the point always been the same?

2. How does a *donatio mortis causâ* resemble a legacy?

3. Give three instances in which a title to personal property can be acquired by occupancy.

4. Can a debt in any case arise independently of contract?

5. What are days of grace in connection with bills of exchange?

6. How do the duties of executors and administrators differ?

7. A legacy is given to A., payable at twenty-one. A. dies before twenty-one. Can his representatives insist on the legacy being paid to them? Give your reason.

8. A. marries B., to whom 100*l.* is owing. A. dies before B. and before the 100*l.* is paid. Does the debt form part of A.'s estate, or does it belong to B. by survivorship?

## VOLUME IV.

THIS volume, as it treats of a subject which is optional at the Final, ought not, it is considered, to be a subject at the Intermediate. However, as it is, you must make the best of it and read the volume carefully, especially as at recent Examinations several questions have been set upon it.

## Fourteenth Week's Work.

## BOOK VI.

CHAPTER I.—*Of the Nature of Crimes and their Punishments.*

„ II.—*Of the Persons capable of committing Crimes.*

„ III.—*Of Principals and Accessories.*

„ IV.—*Of Offences against the Person.*

„ V.—*Of Offences against Rights of Property.*

All these Chapters are important, and the first three particularly so.

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Chapter I.—*Of the Nature of Crimes and their Punishments.*

## REMARKS.

A crime is the violation of a right when considered in reference to the evil tendency of such violation as regards the community at large.

Crimes are divided into *felonies* and *misdemeanors*, or more properly into *treasons*, *felonies* and *misdemeanors*; for although a treason is a felony, all felonies are not treasons.

You must notice particularly the difference between these crimes, and more especially the derivation of the word felony. A man who commits a crime must be punished for it, and the power of punishing is originally vested in each individual; but in a state of society such as our own, this right is impliedly transferred to the sovereign power to award such punishment as may tend to deter the commission of crimes—an end which all human punishment should have in view. The measure of punishment must be left to the legislature to fix, as it is impossible that any strict rule on the subject should be laid down.

[Note carefully the arguments given in the Commentaries against the *lex talionis*, or law of retaliation, as an adequate or permanent rule of punishment. (See p. 14.) And read with care Blackstone's remarks on the evil consequences which formerly ensued from the frequency of capital punishment. (Page 20, n.)

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## POINTS TO NOTE.

- I. Why the criminal law is often termed the "Pleas of the Crown."
- II. What the various derivations of the term "felony" are, and what is evidently the right definition.
- III. How far the law of felony is affected by 33 & 34 Vict. c. 23.
- IV. What the three ways are in which the *end* of human punishments, viz., precaution against future offences of the same kind, may be effected.
- V. Whether a man who attempts, but unsuccessfully, to commit a crime is, according to our law, as guilty as a person who actually carried out his intention.
- VI. Which the greater offence is, to steal a handkerchief from the person of another, or to steal a load of corn in an open field.
- VII. What the evils consequent on excessive punishments are.

## Chapter II.—Of the Persons capable of committing Crimes.

## REMARKS.

In order to constitute a wrongful act, or crime against human laws, there must be, *first*, a vicious will, and *secondly*, an unlawful act consequent on such vicious will. In other words, *the will must always join in the deed*, and there are three cases in which there is not this voluntary joinder of will and deed, and they are:—

- I. Where there is defect of understanding, as in *infancy*, *lunacy* and *idiocy*.

(a) As to *infants*. Their liability for crimes depends to a great extent on their age. Children *under seven* cannot commit felony. *Between seven and fourteen* they are presumably incapable of criminal intention (*doli incapax*), but here *malitia supplet aetatem* (malice supplies the age), and an infant between these ages may, if he appear capable of a criminal intention, be punished, even capitally. He cannot, however, be convicted of rape.

[Note the cases cited on p. 24. *Above fourteen* an infant is equally liable for crimes with a person of full age except for certain acts of omission, such as neglect to repair a highway or bridge, and here the law excuses them because they may not have fortune sufficient for the purpose.]

(b) *Lunacy and idiocy*. At common law a person *non compos*



*mentis* cannot commit a crime, and if after crime committed he become insane, he cannot be tried, or if after trial, and before judgment, he becomes so, he cannot be sentenced, and if after judgment the sentence cannot be carried out. But the question of sane or insane must now be tried by a jury, and if found insane, the prisoner is kept in custody at the Crown's pleasure. (See particularly hereon, 39 & 40 Geo. III. c. 94, and 27 & 28 Vict. c. 29, p. 26.)

It is often difficult to determine whether a man is altogether or only partially insane; if the latter, he is not excused for an offence committed by him: thus a man can be punished for a wrongful act done by him, although he did it with the intention of redressing some supposed grievance, or producing some public benefit, if he knew the act done was contrary to law.

[Note carefully Lord Hale's remarks as to partial insanity, and the decision of the judges in the leading case, *M'Naughten's case*.]

A man who is temporarily insane from drinking is not excused from crimes committed by him, for *drunkenness* is considered, as a general rule, as an aggravation rather than excuse. [Note the difference in the Grecian, Roman, and our own law on this subject.]

II. A second defect occurs where a crime is committed by misfortune or chance, mistake or ignorance, for here there is no conjunction of the will with the deed, owing to the will not being called into action. The mistake or ignorance, however, must be of fact, and not of law, for ignorance of law in criminal cases is no sort of defence, even in the case of a foreigner in whose own country the act committed is not considered a crime.

III. *Where the will is constrained* to join in the act. This may occur in several ways: (a) By *civil* or *private* subjection, as a wife committing a crime is excused, as her will is presumed to be constrained by her husband; she is, however, liable for crimes shown to be committed independently of her husband, and also for crimes of deeper dye, such as treason or murder, and in case of misdemeanor she may, sometimes, be indicted with her husband, as for keeping a brothel.

(b) By *duress per minas*, *i. e.* threats and menaces which induce a fear of present death, or other grievous bodily harm, but such duress is no excuse for the murder of an innocent person although it is for the killing of the assailant.

(c) By *force of circumstances*, where a man has to choose between two evils, for here the will does not act freely, as an officer killing a person who resists his authority in attempting to arrest him.

[Note carefully what is stated in the Commentaries with reference to a man's being justified in stealing, if in great want of food or clothing; note also what appears in connection with the sovereign committing crimes, see pp. 35, 36.]

### Chapter III.—Of Principals and Accessories.

#### REMARKS.

A person who commits a crime may be guilty either as *principal* or *accessory*.

A *principal* is said to be of the *first degree* when he actually perpetrates the crime himself, and of the *second degree* when he is present aiding or abetting in the act. This presence may be *actual* or *constructive*.

[Note the illustrations given on p. 37.]

An *accessory* is one who, not being the chief actor in the offence, nor being present when it was committed, is in some other way concerned therein. Accessories are also of two kinds—namely,

(a) *An accessory before the fact*.—A person who procures another to commit a crime, he himself being absent. The absence is necessary; for if present the person is not an accessory, but a principal.

[Note the illustrations given on p. 40.]

(b) *An accessory after the fact*.—A person who, knowing an offence to have been committed, assists or comforts the felon in any way—*e. g.* by furnishing him with a horse in order to escape, or a hut to hide in. The rule applies even to near relatives, the only exception being in the case of a wife, who cannot become an accessory to a crime committed by her husband by assisting or comforting him; for an obvious reason, that she is presumed to so comfort and assist by her husband's coercion.

In treason all concerned are deemed *principals*. In felonies there may be accessories both before and after the fact, except where the felony is sudden and unpremeditated—*e. g.* manslaughter; for here there can, as a rule, be no accessories *before the fact*. In misdemeanors there are no accessories.

Accessories before the fact are punishable as principals; but acces-

series after the fact receive a lighter punishment. Both can be tried either as accessories or as substantive felons.

[Note the reasons for distinguishing *principals* and *accessories* given on pp. 43, 44.]

#### Chapter IV.—Of Offences against the Person.

##### REMARKS.

In connection with the various offences which are treated of in this and several subsequent Chapters, I propose to give you a tabulated statement divided into three columns. In the first column you will find a definition or description of the offence and the various subdivisions (if any) of it, and a statement whether it is a felony or a misdemeanor,—the letter “f.” signifying the former, and the letter “m.” the latter. In the second column the punishment for the offence is given, and in the third column any apparently useful remarks are added.

In the column of punishment I have made use of certain abbreviations, which will be well explained at the outset.

“P. S.” signifies “penal servitude.”

“Usual imp.” signifies “two years’ imprisonment with or without hard labour.”

“W. H. L.” signifies “*with or without* hard labour.”

“H. L.” signifies “*with* hard labour.”

“S. C.” signifies “with or without solitary confinement.”

“W. W.” signifies “with or without a whipping, *if a male under 16.*”

“Imp.” signifies “imprisonment.”

In connection with “punishments,” it will be useful for you to remember—(a) that there are a great many offences which are all punishable with the same punishment, namely, penal servitude for life, or not less than five years, or imprisonment for two years with or without hard labour, to which, in some cases, solitary confinement or whipping can be added; (b) that penal servitude cannot be ordered for less than five years; (c) that imprisonment can rarely be ordered for more than two years; (d) that solitary confinement must never be for longer than a month at a time, or for more than three months in any one year; (e) that the only offences for which capital punishment may now be ordered are:—i. treason; ii. murder; iii. piracy, with intent to do murder; iv. setting fire to dock yards. I will now proceed with the table.

Offences, Definitions, &c.	Punishment.	Remarks.
I. <i>Homicide, f.</i> Destroying the life of man	.. .. .	Homicide is of two kinds—(a) justifiable or excusable, when free from legal guilt; (b) felonious, when associated with guilt. Notice carefully the circumstances which justify or excuse a person in killing another, and the great difference which formerly existed between justifiable and excusable homicide. Felonious homicide is of three kinds—Suicide (or <i>Felo de se</i> ), Manslaughter, and Murder.
II. <i>Felonious Homicide, f.</i> The killing of a human creature of any age or sex without justification or excuse.	According to circumstances. <i>Vide</i> next three crimes.	If A. persuades B. to kill him, A. is not guilty of suicide, though B. is a murderer. To constitute the crime, the party must be in his senses and of years of discretion. A. advises B. to kill himself and B. does so. A. is accessory before the fact to the murder of B. Note the former mode of burial.
III. <i>Suicide or Felo de se, f.</i> The deliberate act of a man whereby he puts an end to his own existence.	Burial between 9 and 12 p.m. without the Christian rites.	The killing may be <i>voluntarily done, but in a sudden heat</i> ; as if, in a chance medley, between A. and B., A. kills B. Or, it may be <i>involuntarily done, but in the commission of some unlawful act</i> . [Note the examples given on pp. 63, 64.]
IV. <i>Manslaughter, f.</i> The unlawful killing of another without malice express or implied.	P. S. for life—5 years, or usual imp. or a fine.	Malice is absolutely essential to constitute this crime, but it need not always be expressly proved, as it is sometimes implied by law. The injured man must, in order to make the crime murder, die within a year and a day of the injury. The execution is carried out privately under the present law within the prison walls and in the presence of the sheriff, gaoler, and chaplains, and certain others; and the body is generally buried within the prison precincts, an inquest upon it being first held.
V. <i>Murder, f.</i> The unlawful killing by a person of sound mind and discretion of any reasonable creature in being and under the King's peace, with malice aforethought either express or implied; or in other words it is "homicide with malice aforethought."	Death by hanging for principals and accessories before the fact, and 4 years' imp. for accessories after the fact.	This offence was at one time considered almost as bad as actual murder, but not now, as you will see from the imprisonment imposed.
VI. <i>Attempt to Murder, f.</i> (a) An attempt to commit offence No. V. ....	P. S. for life—5 years, or usual imp. and s. c. P. S. for 10—5 years, or usual imp. w. w.	
(b) Sending letters threatening to kill or murder.	P. S. for life—5 years, or the usual imp.	
VII. <i>Mayhem, f.</i> (a) Violently depriving another of one of his fighting members. (b) Any one who unlawfully causes grievous bodily harm or attempts to do so, or who does any act with intent to resist lawful apprehension, is guilty of an offence .....	Idem.	

TABLE OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
VIII. <i>Unlawful Wounding, m.</i>		
IX. <i>Abortion, f.</i>		
(a) The killing of children while in the mother's womb in order to procure a miscarriage.	P. S. for 5 years, or usual imp.	In connection with similar offences, notice what appears on p. 81, particularly as to <i>exploding gunpowder</i> , <i>placing gunpowder near ships</i> , <i>strangling</i> , <i>suffocating</i> , or <i>drugging</i> , in order to enable an offence to be committed.
(b) Knowingly supplying drugs or instrument to procure abortion.	P. S. for life—5 years, or usual imp., s. c.	
X. <i>Concealment of Birth, m.</i> Any one who by secret disposition of the dead body of a child endeavours to conceal the fact of its birth is guilty of this offence.	Usual imp.	The offence is committed whether the child was born dead or alive. Note the old law on this point in foot-note, p. 84.
XI. <i>Abduction, f.</i>		
(a) The taking or detaining against her will any woman having, or being heiress or next of kin to, property, with intent to marry or carnally know her, or to cause her to be married or carnally known by some other person.	P. S. for 14—5 years, or usual imp.	The felon is not entitled to the property which is settled by the Court of Chancery upon the woman.
(b) The taking or fraudulently alluring any such woman under the age of twenty-one from her parents or guardians against their will.		
XII. <i>Rape, f.</i>		
(a) The carnal knowledge of a woman forcibly and against her will.	P. S. for life—5 yrs., or usual imp.	(a) An infant under fourteen cannot be convicted of rape. The person ravished can give evidence, but her credibility is a question for the jury to decide from the circumstances of the case; and they must bear in mind that, detestable as the crime is, it is one of which a man may easily be accused, but which it may be very difficult for him, though innocent, to refute.
(b) Defiling children under twelve years of age, whether with or without their consent is felony.	Idem.	(b, c, d) These offences are now governed by 38 & 39 Vict. c. 94, ss. 3, 4.
(c) Defiling children between twelve and thirteen, whether with or without their consent, is a misdemeanor.	Usual imp.	
(d) Attempt to commit offence (b).	Idem.	
XIII. <i>Kidnapping or Child Stealing, f.</i>		
(a) Unlawfully taking, decoying, or enticing away any child under fourteen, with intent to deprive the parent of its possession, or with	P. S. for 7—5 yrs., or usual imp. w.w.	

<p>Q. parent is a misdemeanor.</p>	<p>XIV. <i>Abandoning Young Children</i>, m. The abandoning of a child under two years of age, the act being done in such a way as to endanger the child's life or health, is a misdemeanor.</p>	<p>P. S. for 5 years, or usual imp.</p>
<p>XV. <i>Baby Farming</i>. It is an offence for any person, except the owner of some house duly registered for the purpose, to receive for hire or reward more than one infant under one year old for the purpose of maintaining them from their parent.</p>	<p>Imp. not exceeding 6 months w. h. l., or a penalty not exceeding 5<i>l</i>.</p>	<p>A house registered for baby-farming purposes must be orderly and properly kept, and the infants supplied with proper nutriment, otherwise the house will be struck off the register. (35 &amp; 36 Vict. c. 38.)</p>
<p>XVI. <i>Unlawfully endangering Railway Passengers</i>, f.</p>	<p>(a) Unlawfully putting any wood, stone, or other thing on or across a railway, or doing any other thing with intent to endanger the safety of any person travelling on such railway is a felony.</p>	<p>P. S. for life—5 yrs., or usual imp. w. w.</p>
<p>(b) Aiding or abetting in the offence is a misdemeanor.</p>	<p>Usual imp.</p>	
<p>XVII. <i>Setting Spring-guns and Man-traps</i>, m. Setting any spring-gun, man-trap, or other engine, with intent to destroy life or inflict grievous bodily harm, is a misdemeanor.</p>	<p>P. S. for 5 years, or usual imp.</p>	<p>The offence is not committed by setting these instruments in a dwelling-house between sunset and sunrise, nor for the purpose of killing vermin.</p>
<p>XVIII. <i>Assault</i>, m. All assaults are misdemeanors.</p>	<p>(a) An assault not causing bodily harm is known as a common assault.</p>	<p>Imp. for 1 year, w. h. l.</p>
<p>(b) An assault without bodily harm, made on a clergyman discharging his duties, and indecent assaults on females, are aggravated assaults.</p>	<p>Usual imp.</p>	
<p>XIX. <i>Bigamy</i>, f. Any man or woman who, having a former wife or husband still living, marries again is guilty of this offence.</p>	<p>P. S. for 7—5 years, or usual imp.</p>	<p>According to Blackstone this offence is more properly called Polygamy. Note carefully the cases in which a second marriage is not bigamy but a mere nullity.</p>

TABLE OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS—continued.

Offences, Definitions, &c.	Punishments.	Remarks.
XX. <i>Libel</i> , n.		
(a) To publish or threaten to publish any libel <i>with intent to extort money</i> is an offence.	Imp. for 3 years.	No criminal proceedings for libels in newspapers can be taken without the consent of the Public Prosecutor. (See 44 & 45 Vict. c. 60.)
(b) To publish a libel <i>knowing it to be false</i> is also an offence.	Imp. for 2 years, or fine.	
(c) To publish a libel without such knowledge is also an offence.	Fine or imp. for 1 year.	[Notice carefully the arguments given on pp. 100, 101, proving that subjecting printers and publishers to punishment for libel in no way interferes with the <i>liberty of the Press</i> .]
(d) To publish any writing of a seditious, blasphemous, treasonable, or immoral nature, is an offence.	Fine and imp.	(d) All copies being condemned to be destroyed, and search of any house or building for the discovery of such documents granted by a J. P.

## POINTS TO NOTE.

- I. A. resists an officer authorized to arrest him. The officer, in order to effect his arrest, deals A. a blow, from the effect of which A. dies. Whether this act on the part of the officer would be deemed felonious, justifiable, or excusable homicide.
- II. A. finds B. committing adultery with his (A.'s) wife, and he kills him then and there. Whether A. is criminally liable for his act.
- III. Prove that "suicide" is a grievous crime.
- IV. A. goes forth armed with a bludgeon, intending to kill B., who, he believes, will pass a certain place at a stated time. Instead of B. comes C., whom A. kills. Whether A., not intending to kill C., is guilty of murder or not.
- V. What the former punishment for murder *was*.
- VI. Define parricide and *petit treason* (*parva proditio*).
- VII. In connection with the law of rape, what the law on the following points is:—(a) How it was punishable by the old Mosaic law; (b) Whether the offence can be committed to a prostitute; (c) Why great care should be taken to sift the plaintiff's evidence.

[NOTE.—The principal statute at present regulating the law regarding offences against the person is 24 & 25 Vict. c. 100.]



**Chapter V.—Of Offences against Property.**  
**OFFENCES AGAINST PROPERTY.**

Offences, Definition, &c.	Punishment.	Remarks.
I. <i>Arson</i> , <i>f.</i> The malicious and wilful burning of the house, or outhouse, of another man.	P.S. for life—5 yrs., or usual imp., s. c., w. w.	The same offence with the same punishment is committed by the burning of a church or other place of divine worship, or by firing any shop, office, stable, &c., see p. 106. Firing or attempting to fire not amounting to arson is also a felony, but the punishment is less, see p. 107.
II. <i>Burglary</i> , <i>f.</i> The breaking and entering, by night, into a mansion house with intent to commit a felony; or, with a like intent, the entering and then breaking out of a mansion house.	P.S. for life—5 yrs., or usual imp. and s. c.	There are four requisites to constitute this crime—(1) <i>The time</i> , i. e., it must be by night, and for this purpose the night is considered to commence at 9 p.m. and end at 6 a.m.; (2) <i>The place</i> , i. e., it must be a mansion house, or any building connected with a dwelling-house, either by means of an immediate communication or a covered passage or way [note hereon what appears on p. 110]; (3) <i>The manner</i> —there must be a breaking either in or out, e. g. forcing a door or window, or coming down a chimney; and there must be the entry, but the slightest entry of any part of the body suffices; (4) <i>The intent</i> must be felonious, otherwise the entry is a trespass only, but it makes no difference whether the act intended is perpetrated or not. [Note as to entries by night not constituting burglary, and as to being found at night under suspicious circumstances, see p. 114.]
III. <i>Sacrilege</i> , <i>f.</i> The breaking and entering a place of divine worship and committing a felony therein.	Same as burglary.	The felony must be committed.
IV. <i>Housebreaking</i> , <i>f.</i> (a) The breaking and entering, during the day, any house or building and committing a felony therein. (1) It is also a felony to so break and enter with intent to commit a felony, although the intention is not carried out.	P.S. for 14—5 yrs., or usual imp. P.S. 7—5 years, or usual imp.	This is a kind of burglary <i>by day</i> , but the offence can be committed not only in dwelling-houses but also in shops, warehouses, schoolhouses, or counting-houses, and here it differs from burglary, and the punishment you will observe is not so severe.

- (a) Simple larceny or theft unaccompanied with any circumstances of aggravation.
- (b) Mixed larceny, a theft accompanied with circumstances of aggravation, *e.g.* (i) stealing to the extent of 5*l.* in a dwelling-house; (ii) stealing any chattel with threats, putting persons to bodily fear in a house; (iii) stealing from a ship.
- (c) Larceny from the person by an open and violent assault, known as robbery.
- (d) Assault with intent to rob, a species of mixed larceny.
- (e) Larceny by a clerk or servant, known as *embezzlement*.
- or usual imp. and s. c. and w. w. If the thief has been twice summarily convicted, or once convicted on an indictment for misdemeanor, the P. S. may be for 7 years, or if previously convicted for felony it may be for 10 years.
- P. S. for 14—5 years, or usual imp.
- P. S. for 14—5 years, or usual imp. and s. c. and w. w.
- P. S. for 5 years, or usual imp. If the party guilty be armed with an offensive weapon.\*
- Same as robbery (see (c) above), except that when committed by servants or clerks in the Bank of England the P. S. may be for life.
- [note that if A. lends B. a horse, and B. keeps it, this is not larceny, as B. did not *unlawfully* come into possession of the chattel;] (b) the goods, or a part of them, must be carried away [any slight removal suffices]; (c) the taking and removal must be with the intent to *steal* them.
- [Note that if a servant uses his master's horse without leave, and returns it to the stable, this is not larceny.]
- At common law it was only of goods strictly personal upon which larceny could be committed, and not anything savouring of the land; but this strict rule has been altered by statute, and larceny can be committed of deeds, records, certain animals, *ferre nature, fruit, &c.* (See foot-note on p. 126.) Again, at common law a bailee could not commit larceny of the goods bailed, but now, by fraudulently converting the bail, he is guilty of larceny.
- This was "rapine" among the civilians. The three requisites to constitute the offence are:—(1) An unlawful taking; (2) the property taken must be goods or money, but if so, the smallness of the value makes no difference; (3) the taking must be by force or a previous putting in fear.
- [Notice on p. 133 what punishment a man subjects himself to by demanding property by threats, or by accusing persons of having committed heinous offences.]
- \* or he was in company with others, or there was personal violence, the P. S. may be for life.
- Embezzlement differs from larceny in that it is committed of property which is not at the time in the actual possession of the owner.
- A banker, broker, solicitor, or other agent entrusted with money or securities, by wrongfully converting them is guilty of a misdemeanor, and subject to P. S. for 5—7 years, or usual imp. and s. c.
- [Notice carefully what appears on pp. 138, 139, as to trustees, directors, and other public officers.]

## OFFENCES AGAINST PROPERTY—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<b>V. Larceny (or Theft)—continued.</b>		
(f) Larcenies relating to the post-office, subdivided thus:—		
(i) Any post-office official doing any of the following acts is guilty of a misdemeanor: (a) Opening or delaying letters; (b) embezzling or destroying printed matter sent by book-post.	Fine and imprisonment at the Court's discretion.	
(ii) Any post-office official embezzling, secreting or destroying a letter is guilty of felony.	P. S. for 7—5 years, or usual imp. If the letter contained property, the P. S. may be for life.	
(iii) Anyone stealing a mail, or part of a mail, or stopping a mail to rob or search it.	P. S. for 7—5 years, or usual imp.	
(iv) Anyone taking a letter-bag, or a letter from it, or unlawfully opening it.	P. S. 14—5 years, or usual imp.	
<b>VI. Receiving Stolen Property, &amp;c.</b>		
(a) Receiving property obtained by felony is a felony.	P. S. 14—5 years, or usual imp.	This offence is committed whether the receipt of the goods was for profit or concealment. In Blackstone's time receivers of stolen property were deemed accessories after the fact, and liable to transportation for 14 years.
(b) Receiving knowingly property obtained by misdemeanor is a misdemeanor.	Same as last, except that P. S. must not exceed 7 years.	A person obtaining goods by false pretences is guilty of misdemeanor, and a recipient of such goods would be a misde-menant, and not a felon.
(c) Anyone keeping a house for the reception of thieves, or reputed thieves, is guilty of an offence.	Fine not exceeding 5 <i>l.</i> , and in default of payment imp. not exceeding 3 months, w. l. t.	

The statute which regulates these malicious injuries to property is 24 & 25 Vict. c. 97. At common law such injuries constituted a trespass only. It is impossible for you to remember these various injuries enumerated. I have endeavoured to pick out the most important for your purpose.

<p>VII. <i>Malicious Injuries to Property.</i> Anyone who commits malicious injuries to property, commits an offence, sometimes amounting to a felony and sometimes to a misdemeanor only, and is liable to punishment varying according to the nature of the property injured, and in nearly all cases to at least.....</p> <p>The injury constitutes a felony when done to the following property, and penal servitude in lieu of imp. may be ordered for the periods mentioned:—</p> <p>(1) Woven goods during manufacture and to the machinery, or to vessels (in some cases), bridges, viaducts, railways, and rolling stock.</p> <p>(2) Hopbinds, buildings, cattle, wrecks.</p> <p>(3) Machinery used otherwise than as in No. 1, mines, and mining engines, navigable river and canal, ponds, buoys, and sea marks.</p> <p>(4) Trees and shrubs (in most cases), garden produce (2nd offence).</p> <p>Injuries to telegraphs and public works of art, constitute a misdemeanor only, and are punishable with imp.</p>	<p>Usual imp.</p> <p>P. S. for life.</p> <p>P. S. 14—5 years.</p> <p>P. S. 7—5 years.</p> <p>P. S. 5 years.</p>
<p>VIII. <i>Forgery (Crimen falsi), f.</i></p> <p>(a) The fraudulent making or altering of a writing or seal to the prejudice of another man's right or of a stamp to the prejudice of the revenue.</p> <p>(b) Forgery of bills of exchange and other documents, or, as it is called, "Forgery by Statute," is a felony.</p> <p>(c) Forgery of stock certificates, or coupons issued by the Bank of England in payment of interest of the national debt, or the personation of the owners of such stock, is felony.</p>	<p>P. S. life—5 years, or usual imp.</p> <p>P. S. for life — 5 years, according to the instrument forged [see foot note on p. 142] or usual imp. and s. o.</p> <p>P. S. for life — 5 years, or usual imp. and s. c.</p>

The definition given is that of common law forgery, but by statute (24 & 25 Vict. c. 98), various other acts besides those mentioned in the definition are made forgery. (See p. 148.) The forgery must be capable of deceiving persons who use ordinary observation, and the alteration must be material. Forgery cannot be proved by a mere comparison of handwriting.

The other documents referred to are those set out in 24 & 25 Vict. c. 98. (See p. 149.)

These acts were made forgery by the Forgery Act, 1870 (33 & 34 Vict. c. 68).

## OFFENCES AGAINST PROPERTY—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<p><b>IX. False Personation, f.</b></p> <p>(1) To personate a soldier in order to receive his pay, pension, prize money, or wages, is felony.</p> <p>(2) To personate a seaman, or owner of note, stock in the Bank of England or Ireland, or stock of any incorporated company, with a fraudulent intention, is felony.</p> <p>(3) To personate any person, or the representative of any person, in order to obtain property, is felony.</p>	P. S. for life—5 years, or usual imp. Idem.	These are by various acts of parliament. (See footnote on p. 161).
	P. S. for life—5 years, or usual imp. and a. o.	This is under the False Personation Act, 1874, given on p. 161 of the Commentaries. The necessity of passing this Act was made apparent by the circumstances of the Tichborne case.
<b>X. Obtaining Money by False Pretences, m.</b> —Any person who, with intent to defraud and by false pretences, obtains property, or a valuable security, or a signature to some valuable security, is guilty of a misdemeanor.	P. S. for life—5 years, or usual imp.	If at a trial for this offence the offender is found guilty of larceny he is not to be acquitted. (See p. 162.)
<b>XI. Fraudulent Concealment of Deeds, or Falsification of Pedigree, m.</b> —Any one (whether the party himself or his solicitor or agent) who on a sale or mortgage, fraudulently cancels any document, or conceals any incumbrance, or falsifies any pedigree on which the title to lands depends, is guilty of a misdemeanor.	Fine or usual imp.	This is under Lord St. Leonards' Act and Amending Act (22 & 23 Vict. c. 35 and 23 & 24 Vict. c. 38). The prosecution cannot take place without the Attorney-General or Solicitor-General's consent, nor without notice to the person against whom the prosecution is intended. (Page 153.)
<b>XII. Falsification of Accounts, m.</b> —Any clerk or servant fraudulently altering, destroying, or falsifying the books, accounts, &c., of his employer, or making any false entry, &c., therein, is guilty of a misdemeanor.	P. S. 5, 7 years, or usual imp.	This is under 24 & 25 Vict. c. 96, and 38 & 39 Vict. c. 24 (The Falsification of Accounts Act, 1875).
<b>XIII. Cheating.</b> —To sell articles under a false trade mark, or to use false weights and mea-	Fine and imp.	If the cheating contravenes some act of parliament it is better to levy the forfeiture given by the act than to proceed at common law.

1. <i>Gold and Silver Coin.</i>			
(a) Making or dealing with counterfeit gold or silver coin, or buying, selling, or possessing machines for such purposes, is a felony.	P. S. life—5 years, or usual imp., and s. o.; and, in addition, offender may be required to find sureties to keep the peace.	See Nos. 1, 2, 3 and 4, set out on pp. 154, 155.	
(b) Diminishing such coin with fraudulent intent is felony.	P. S. 14—6 years, or usual imp., and s. o.	See No. 5, p. 155.	
(c) Knowingly being in possession of such coin so diminished, is felony.	P. S. 7, 5 years, or usual imp. and s. o.	See No. 6, p. 155.	
(d) Knowingly uttering or putting off counterfeit gold or silver coin is a misdemeanor for first offence, and, for second offence, a felony.	<i>First Offence</i> —imp. w. h. l. for one year. <i>Second Offence</i> , P. S. life—5 years, or usual imp., and s. o. Imp. for one year, w. h. l. and s. o.	See No. 7, p. 156; and notice the difference in the punishment, when the uttering has taken place more than once, or the utterer has other coins in his possession.	
(e) Tendering less valuable coin as current gold or silver coin, with intent to defraud, is a misdemeanor.		See No. 8, p. 157.	
2. <i>Copper Coin.</i>			
(a) Making or dealing with counterfeit copper coin, or tools for coining them, is a felony.	P. S. 7—5 years, or usual imp., and s. o.	See No. 1, p. 157.	
(b) Uttering or knowingly having in possession three or more pieces of false copper coin, is a misdemeanor.	Imp. for one year, w. h. l. and s. o.	See No. 2, p. 157.	
3. <i>Gold, Silver, or Copper Coin.</i>			
Exporting any counterfeit coin is a misdemeanor.	Usual imp.	See p. 158.	
Defacing any coin, by stamping thereon names or words, is a misdemeanor.	Imp. for one year, w. h. l. and s. o.	Such coin cannot be the subject of a legal tender, p. 158.	
Tendering such defaced coin is an offence.	Fine not exceeding 40s.		

## OFFENCES AGAINST PROPERTY—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<p>XIV. <i>Coinage Offences</i>—continued.</p> <p>4. <i>Foreign Gold and Silver Coin.</i></p> <p>(a) Counterfeiting such coins is a felony.</p>	<p>P. S. 7—5 years, or usual imp. with s. c.</p>	
<p>(b) Uttering such coins is a misdemeanor for first and second offences; but felony for third offence.</p>	<p>s. c. <i>First Offence</i>, 6 months' imp. w. h. l.</p> <p><i>Second Offence</i>, usual imp. with s. c.</p> <p><i>Third Offence</i>, P. S. life—5 years, or usual imp. and s. c.</p>	<p>See pp. 158, 159.</p>
<p>5. <i>Foreign Copper (or inferior) Coin.</i></p> <p>Counterfeiting such coin is a misdemeanor.</p>	<p><i>First Offence</i>, imp. for one year.</p> <p><i>Second Offence</i>, P. S. 7—5 years, or usual imp. with s. c.</p>	<p>Id.</p>
<p>6. <i>Foreign Gold, Silver, or inferior Coin.</i></p> <p>The possession of five pieces of such coin, being counterfeit, without lawful excuse, is an offence.</p>	<p>Fine, 40s. for every piece found in possession; and, in default of payment, imp. for 3 months.</p>	<p>The base coin is forfeited and destroyed.</p>

## TEST PAPER TO WORK OUT.

1. Why is an elaborate distinction made between accessories *before* the fact and principals, when they are generally subject to the same punishment? In what case is an accessory before the fact punishable with a smaller punishment than the principal?
2. Give instances of justifiable homicide.
3. Define "murder." Distinguish it from "manslaughter."
4. A park-keeper ties a boy, whom he found stealing wood in the park, to a horse's tail, and so dragged him along the park. The boy died from the effect of the "dragging." Is the park-keeper's offence murder or manslaughter?
5. Define "parricide." How was this crime punished by the Roman law?
6. Enumerate the crimes for which, at the present day, sentence of death may be recorded.
7. Define "burglary." By what other name is the offence known?
8. Distinguish (a) larceny and embezzlement, (b) larceny and robbery; and how has the common law offence been extended by statute?

## Fifteenth Week's Work.

- CHAPTER VI.—*Of Offences against Public Order, Internal and External.*
- „ VII.—*Of Offences against Religion, Morals, and Public Convenience.*
- „ VIII.—*Of Offences against the Administration of Justice and the Maintenance of Public Order.*
- „ IX.—*Of the Means of Preventing Offences.*

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In your work for the last week you read of offence affecting the persons and property of individuals. During the week's work on which you are now about to enter, you are to read, learn and digest the law respecting offences affecting the public generally, and which in the Commentaries are divided into three great branches, viz.—(a) Offences against public order; (b) Offences against religion, morals, and public convenience; and (c) Offences affecting the administration of justice and the maintenance of public order—and to assist you I propose to give an epitome in the form of a table of the contents of each Chapter.



Chapter VI.—Of Offences against Public Order, Internal and External.

Offences, Definitions, &c.	Punishment.	Remarks.
1. <i>High Treason, f. (Lesae majestatis).</i> Treachery against the king or sovereign lord. The following acts amount to treason :—	<i>Former punishment.</i> <i>Males.</i> (1) Conveyance to the place of execution on a hurdle; (2) Hanging; (3) Decapitation; of (4) Quartering of the body; (5) Distribution of head and quarter at the sovereign's pleasure.	(a) The king here means the sovereign in possession of the throne, whether <i>de jure</i> or <i>de facto</i> , i. e. independently of his title to it (note carefully the reasons for this given on pp. 164—166). The compassing or imagining (synonymous terms) signify purpose of the mind, and therefore, to kill the sovereign by <i>mistake</i> is not treason; and there must be some open or overt act showing the purpose, e. g. providing weapons, conspiring against the king, &c. Words <i>spoken</i> , however atrocious, do not constitute an overt act sufficient to convict of treason, but they may if <i>written</i> .
(b) Violating the king's companion, or the king's daughter unmarried, or his eldest son and heir's wife.	<i>Females.</i> Nos. 1 and 2 only for decency's sake.	(b) No force need here be proved, for it is treason, even though the companion, daughter or wife consent. The object of the law being to prevent the royal blood from any suspicion of bastardy, and, consequently, violating a queen <i>despiser</i> is not treason.
(c) Levying war against the king in his realm.	The <i>present punishment</i> is regulated by 33 & 34 Vict. c. 33, and consists in the traitor, whether male or female, being hanged by the neck till dead.	(c) Treason is here committed, whether the act alleged was done with the view of dethroning the king, reforming religion, or other grievance; but a bare conspiracy does not constitute treason under this head, though it may under head (a), as shown.
(d) Aiding the king's enemies in England or elsewhere.	[N.B. No prosecution for treason can take place after three years from the act, except where the act consisted in the designation of an assumed person as the successor to the crown by the act of settlement.]	(d) This must be proved by some overt act, such as sending the <i>enemy</i> (i. e. some one with whom at the time the country is at open war) provisions. Assisting pirates constitute treason under this head. A <i>rebel</i> may be assisted, for he is not an enemy; and if a person, through fear of loss of life or limb, assist the king's enemies, he is not guilty of treason.
(e) Slaying the lord chancellor or any of the king's justices of the one bench or the other, justices in eyre or justices in assize, and all other justices assigned to hear and determine, being in their place doing their offices.	[N.B. No prosecution for treason can take place after three years from the act, except where the act consisted in the designation of an assumed person as the successor to the crown by the act of settlement.]	(e) The persons mentioned must be actually killed, and a bare attempt to kill, whether accompanied with wounding or not, does not constitute treason under this head.
(f) Finding or conspiring to deprive any person, being next in succession to the crown by the act of settlement,		[N.B. The above were all made treason by 25 Edw. III. c. 2 (The Statute of Treasons), the other Acts constituting treason have been added since.] (f) This was made treason by 1 Anno, st. 2, c. 21.

<p>(g) MALICIOUSLY, BY PRIME OR WRITING, maintaining (i) that any person hath right to the Crown other than as provided by the act of settlement; or (ii) that the king, with the authority of parliament, cannot make laws binding the Crown and the descent thereof.</p> <p>(h) Compassing or intending death, or harm tending to destruction, maiming, imprisoning, or restraining the person of the king, his heirs, and successors, and expressing such intention by any printing or writing, or by any overt act.</p>	<p>Note the dreadful punishment for treason in Blackstone's time, footnote on p. 177.]</p>	<p>(g) These by 6 Anno, c. 7.</p> <p>(h) This by 36 Geo. III. c. 7.</p>
<p>II. <i>Misprision of Treason</i>. This is the bare knowledge and concealment of treason.</p>	<p>Imp. for life. Prior to 1870 the offender lost the profits of his lands, and forfeited all his goods to the crown. But in that year all forfeiture for felony and treason was abolished.</p>	<p>Misprision is committed in every felony, and is defined as "something not amounting to a capital offence," and arises either by some act of omission (as concealment) or commission, when it is more properly a <i>contempt</i> or <i>high misdemeanor</i>. (See p. 178.)</p>
<p>III. <i>High Misdemeanor</i>. The doing any thing to or about the Queen with intent to injure or alarm her, or to commit a breach of the peace.</p>	<p>P. S. for 7—5 yrs. or imp. for not more than 3 years, with or without three whippings.</p>	<p>This offence is created by 6 &amp; 6 Vict. c. 61.</p>
<p>IV. <i>Treason-Felony</i>. The conspiring or intending her Majesty's deposition from all or any of her dominions, levying war against her in the united kingdom, to force her to change her measures or to intimidate Parliament, or inducing a foreigner to invade her Majesty's dominions, and evidencing it by writing, printing, or some other overt act.</p>	<p>P. S. for life—5 yrs. or usual imp.</p>	<p>This offence is created by 11 &amp; 12 Vict. c. 12, which contains a provision that if the act done amount to treason, the indictment on which the offender is tried shall not be void.</p>
<p>V. <i>Speaking or Writing against the Sovereign</i>. It is an offence to speak or write against, curse, or wish ill to, scandalize, or to do other act respecting the Sovereign, which may lessen him or her in the esteem of subjects.</p>	<p>Fine or imp.</p>	<p>In some cases corporal punishment may be added to the fine or imprisonment. (See instances of these cases given on p. 181.)</p>

## CHAPTER VI.—OF OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<p>VI. <i>Premunire</i>. The offence of introducing a foreign power into the country. The offence is committed in the following, among other, ways:—</p> <p>(a) By introducing bulls against the King, or his crown or realm.</p> <p>(b) By the refusal by the dean and chapter to elect the person named by the King as bishop for a vacant bishopric.</p> <p>(c) By advisedly denying the Sovereign's right to the crown.</p>	<p>The offender is out of the King's protection. His lands and tenements, goods and chattels are forfeited to the King, and his body remains in prison during the King's pleasure.</p> <p>Fine and imp.</p>	<p>The offence of <i>premunire</i> is so called owing to the words of the writ. (See p. 182.) A prosecution for this offence is unknown in our courts. The only instance of such a prosecution on state trials is one which occurred in Charles II.'s reign against certain persons who refused to take the oath of allegiance to that King. The forfeiture for <i>premunire</i> still exists, as the Statute of 1870 abolishing forfeiture for felony does not apply to <i>premunire</i>, that not being a felony.</p>
<p>VII. <i>Contempts against the King's Title</i>. Any heedless denial of the crown's right, not amounting to treason or <i>premunire</i>, constitute an offence.</p>	<p>100<i>l.</i> penalty.</p>	<p>This offence was created by 14 &amp; 15 Vict. c. 80, but the statute was not acted upon, and it was repealed by 34 &amp; 35 Vict. c. 53, which however contains a clause that it (the repealing act) should not be considered as authorizing the conferring of rank &amp;c. on a subject of this realm by any person other than our gracious Sovereign.</p>
<p>VIII. <i>Contempts against the Crown's Ecclesiastical Supremacy</i>. Procuring from Rome a Bull for constituting archbishops or bishops, or assuming the title of archbishop, bishop or dean of any city, place, or territory in the United Kingdom.</p>	<p>Fine or imp.</p>	<p>Formerly <i>drawing blood</i> in the King's palace was an offence punishable with fine or imprisonment <i>and</i> loss of the offender's right hand.</p>
<p>IX. <i>Contempts against the Royal Palaces</i>. Executing process of law within the verge of the Royal Palace or in the Tower is an offence, unless permission has been first obtained from the proper authority.</p>	<p>Generally fine or imp.</p>	
<p>X. <i>Maladministration of High Officers</i>. High officers in public trust and employment improperly carrying out their trust are guilty of a contempt against the Sovereign or his government. Instances:—</p> <p>(a) Embezzling the public money.</p> <p>(b) Furnishing false statements of the public revenue.</p> <p>(c) Embezzlement of the crown property by any of its officers.</p>		

or selling any public office in the gift of the Crown, or receiving or paying money for or soliciting or obtaining any such office, or opening or advertising houses for transacting business relating to the sale of such offices, is guilty of a misdemeanor.	Time or imp.
<b>XII. Smuggling, &amp;c.</b> The importing or exporting prohibited goods, or without paying the duties on goods not prohibited.	Fine or imp. as below.
(a) Anyone maliciously shooting at any Government vessel, or maliciously shooting at or wounding any person employed in suppressing smuggling, is guilty of felony.	P. S. life—5 years, or imp. for not exceeding 3 years.
(b) Anyone procuring persons to assemble for the purpose of being concerned in running prohibited goods, or goods the duty on which is unpaid, is guilty of an offence.	Imp. but not more than 12 months.
(c) Any person found with smuggled goods, either armed with weapons or disguised, within 5 miles of the sea-coast or of a tidal river, is guilty of an offence.	Imp. w. h. l. for not exceeding 3 years.
(d) Any person signalling smuggling vessels is guilty of a misdemeanor.	Penalty of 100 <i>l.</i> , or imp. for 1 year.
(e) Any person convicted of an offence against the Customs Act, and adjudged to pay a penalty exceeding 100 <i>l.</i> , is subject to the following punishments:— For first Offence ..... For a subsequent Offence (in lieu of penalty)...	Imp. 9—6 months. Imp. 12—6 months, w. h. l.
<b>XIII. Offences against the Royal Naval and Military Stores.</b> <i>As to the Royal Stores.</i>	Usual imp.
(a) Anyone who impresses the broad arrow on goods without authority is guilty of a misdemeanor.	
(b) Any one obliterating any such mark is guilty of felony.	P. S. for 7—5 years, on usual imp.
(c) Setting on fire, burning, or destroying any of H.M.'s ships, arsenals, magazines, or stores, is felony.	Death.

(c) This offence is regulated by 12 Geo. III. c. 24.

These offences and their punishments are now regulated by 39 & 40 Vict. c. 36 (The Customs Consolidation Act, 1876.)  
All smuggled goods are forfeited to the crown.

## CHAPTER VI.—OF OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<p><b>XIV. Service of Foreign States.</b> Any British subject, without H.M.'s licence, accepting any commission in the military or naval service of any foreign state at war with a state at peace with her majesty, or who quits, or attempts to quit, H.M.'s dominions with the intention of accepting such service is guilty of an offence.</p> <p>Any person building or equipping a ship for the purposes of such a foreign state as mentioned, or being in any way concerned in augmenting its warlike forces, is guilty of a misdemeanour.</p>	<p>Fine or imp. for 2 years.</p>	
<p><b>XV. Seducing to desert.</b> Any one maliciously seducing soldiers or sailors in the royal force to desert, or stirring such persons up to mutiny or to any traitorous practice, is guilty of felony.</p>	<p>Idem. The ship may be detained.</p>	
<p><b>XVI. Administering illegal Oaths or being engaged in illegal Societies.</b></p> <p>(a) Any one who administers or takes unlawful oaths for mutinous or seditious purposes, or belongs to any seditious society or confederacy, or refuses to give evidence against persons guilty of such offences, is guilty of felony.</p> <p>(b) Any one administering or taking (or assisting therein) oaths binding a person to the commission of treason, murder, or capital offence, is guilty of felony.</p>	<p>P. S. life—5 years, or usual imp. and s. o.</p> <p>P. S. 7—5 years.</p> <p>P. S. life—5 years.</p>	<p>In other cases of desertion the offender is tried by court martial under 29 &amp; 30 Vict. c. 109 (The Naval Discipline Act, 1860) and 42 &amp; 43 Vict. c. 33 (The Army Discipline and Regulation Act, 1879).</p> <p>(a) The oath or engagement being taken under compulsion is an excuse if the guilty person disclose the whole matter within four days to a justice, or (if a soldier or seaman) to his commanding officer. Notice particularly what societies are deemed to be <i>unlawful combinations</i>. See p. 206.</p> <p>(b) Compulsion is no excuse unless discovery of the matter is made within 14 days.</p>
<p><b>XVII. Miscellaneous Offences against the Royal prerogative.</b> The following acts constitute misprision and contempt:—</p> <p>(a) Concealing treasure trove.</p> <p>(b) Preferring the interests of a foreign potentate to our own sovereign.</p> <p>(c) Disobeying the sovereign's lawful commands</p> <p>(d) Disobeying an act of parliament where no</p>	<p>Fine and imp.</p>	

<p>(9) sons, and refusal by them to disperse for the space of one hour, they having been commanded to do so by proclamation made by a justice of the peace, sheriff, undersheriff, or mayor.</p> <p>(b) Preventing the Riot Act being read is also felony.</p>	<p>P. S. 100 life—6 yrs. or usual imp.</p> <p>Idem.</p>	<p>Officers killing any of the mob after the reading of the Act are indemnified from liability.</p>
<p>XIX. <i>Riotous Demolition of Buildings, &amp;c.</i> The assembling together riotously of persons, and the unlawful and forcible pulling down by them of churches, houses, buildings, or machinery.</p>	<p>P. S. life—5 years, or usual imp.</p>	<p>The hundredors (i. e. the inhabitants of the hundred in which the demolition takes place) must compensate the person who has suffered by the demolition if the latter go before a justice of the peace, state on oath the names of the offenders, and commence an action for damages against the hundredors within three months. If the damage is under 30<i>l.</i> the amount can be recovered summarily before justices at special sessions.</p>
<p>XX. <i>Poaching.</i></p> <p>(a) Any one who <i>by night</i> takes or destroys game, or who has with him nets, guns, or other instruments to take or destroy game with, commits an offence.</p>	<p><i>First Offence.</i> Imp. and h. l. for 3 months, and to find sureties for good behaviour for 12 months afterwards; and*</p>	<p>*[if unable to do this, imp. for 6 more months may be ordered. For <i>second offence</i>, the above periods are doubled. For <i>third offence</i>, P. S. 7, 5 years, or usual imp.]</p>
<p>(b) Any poacher who resists with a weapon the owner of the land or his servant in their attempts to seize him, is guilty of a misdemeanor.</p> <p>(c) Any three or more persons poaching, and being armed with some weapon, are guilty of a misdemeanor.</p>	<p>P. S. 7, 5 years, or usual imp.</p> <p>P. S. 14, 5 years, or imp. for two years and h. l.</p>	<p>Anyone is justified in separating the combatants, and peace officers are <i>bound</i> to interfere. * [length of the imprisonment will depend on the circumstances of each case; see pp. 211, 212.]</p>
<p>XXI. <i>Affrays, &amp;c.</i> Any two or more persons fighting in some public place to the terror of her Majesty's subjects are guilty of a misdemeanor.</p>	<p>Fine and imp. The amount of the fine and the</p>	

## CHAPTER VI.—OF OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<b>XXII. Riots, Routs, and Unlawful Assemblies.</b> <i>Riot.</i> The assembling together of three or more persons, and carrying out of some act or enterprise unlawfully and turbulently to the terror of the people, is a misdemeanor. <i>Rout.</i> The same as riot, except that the act intended to be done is not carried out. <i>Unlawful Assemblies.</i> Persons meeting together in numbers, with such circumstances of terror as must endanger the peace, are guilty of a misdemeanor.	Fine and imp. w. h. l.  Fine and imp. Idem.	Any indecent behaviour in church, or in a burial ground, or any molesting of the authorized minister in the celebration of divine service comes under the offence, and is punishable with 64. fine, or imprisonment for two months. [Note the distinction between this riot, and riot under the Riot Act considered above. Note also the provisions of 13 Hen. IV. c. 7, as to suppressing these riots, routs, and assemblies, and arresting the offenders, and the penalties incurred by anyone who refuses to lend aid for the purposes. (See p. 214.)]
<b>XXIII. Tumultuous Petitions.</b> (a) More than 20 persons signing their names to a petition without the proper approval are guilty of an offence. (b) More than 10 persons delivering a petition on any day in which Parliament or the Courts of Westminster sit commit an offence. (c) Fifty persons collecting on any day on which Parliament or the courts at Westminster sit within a mile of the gate of Westminster Hall, unless to consider or prepare a complaint to Parliament for alteration of matters in church or state, constitute an <i>unlawful assembly</i> .	Fine 100l. and imp. for 3 months. Idem.  Fine and imp.	(a) The proper approval referred to is <i>in the country</i> , that of three justices of the peace, or of the majority of the grand jury at the assizes or sessions.  (b) This law does not apply to meetings for the election of members of Parliament, nor to meetings of persons attending upon business of either House of Parliament, or of any of the courts at Westminster.
<b>XXIV. forcible Entry or Detainer, m.</b> To violently take, or unlawfully take and violently keep possession of, lands with menaces, force and arms without authority of the law, is a misdemeanor.	Fine and imp.	You will remember from Vol. II. that if a man is wrongfully deprived of his lands he may, if he can do so <i>peaceably</i> , enter upon them, and so obtain possession, but he must use no force, and if he does he becomes guilty of this offence.
<b>XXV. Going Armed, m.</b> To go about armed on foot or horse with dangerous or unusual weapons, and thus disturbing the public peace, is a misdemeanor.	Imp. and forfeiture of the arms.	

news with the view of embittering the Sovereign and the nobility, or concerning any great man, is a misdemeanor.	
XXVII. <i>False and Pretended Prophecies</i> , m. To make a false or pretended prophecy with the view of disturbing the public peace, is a misdemeanor.	Fine or imp.
XXVIII. <i>Challenge to Fight</i> , m.	Fine and imp.
XXIX. <i>Offences against the Law of Nations</i> . Consisting mainly of three kinds— (i) The violation of safe conducts. (ii) The infringement of the rights of ambassadors. (iii) Piracy, i. e. robbery or depredations on the high seas.	P. S. for life—5 yrs. or usual imprisonment, unless accompanied with intent to murder, for then death may be awarded.

Note carefully the various offences which come under the head of piracy. See *ante*, p. 225.



## Chapter VII.—Of Offences against Religion, Morals and Public Convenience.

Offences, Definitions, &c.	Punishment.	Remarks.
<p>I. <i>Apostasy</i>. A total renunciation of religion by embracing either a false religion or no religion at all. The following acts constitute this offence:—</p> <p>(a) Any Christian asserting that there are more gods than one, or</p> <p>(b) Denying the truth of the Christian religion, or</p> <p>(c) Denying the divine origin of the Old or New Testament.</p>	<p><i>First Offence</i>. The offender is de- ferred from hold- ing any office ec- clesiastical, civil, or military unless within 4 months he renounce his error in the court in which he was convicted.*</p> <p>The old punish- ment was <i>burn- ing</i>, but the writ <i>de heretico com- burando</i> was abo- lished in Charles II.'s reign, and heretics were sub- jected to ecde- siastical censure only as a punish- ment.</p>	<p>This subject is regulated by 9 Will. III. c. 35.</p> <p>[* <i>Second Offence</i> makes the offender incapable of bringing an action, or holding the office of guardian, executor, legatee, or grantee, and liable to imprisonment for three years without bail.]</p>
<p>II. <i>Heresy</i>. The public and obstinate denial of some of the principal doctrines of Christianity.</p>	<p>The old punish- ment was <i>burn- ing</i>, but the writ <i>de heretico com- burando</i> was abo- lished in Charles II.'s reign, and heretics were sub- jected to ecde- siastical censure only as a punish- ment.</p>	<p>In connexion with this offence note carefully the provisions of the Bloody Statute (31 Hen. VIII. c. 14), and of 1 Eliz. c. 1, pp. 232, 233.</p>
<p>III. <i>Blasphemy</i>. The denying of the Almighty's being or Providence, or contumacious re- proaches of our Lord and Saviour Christ, or profane scoffing at the Holy Scriptures.</p>	<p>Fine and imp. or corporal punish- ment.</p>	
<p>IV. <i>Revilting the Ordinances of the Church</i>. Is a crime carrying with it the utmost indecency, arrogance and ingratitude. The following acts come within the offence:—</p> <p>(a) Anyone reviling the Sacrament of the Lord's Supper.</p> <p>(b) An <i>ordained minister</i> speaking anything in derogation of the Book of Common Prayer.</p>	<p>(a) Fine and imp. (b) <i>First Offence</i>. If unbeneficed, imp. for one year; if beneficed, imp. for six months, and forfeiture of a year's value of his benefice.*</p>	<p>These offences, you will observe, are punished, not because the offender <i>thinks</i> differently from the National Church (for there is no punishment for this), but because he <i>acts</i> at that Church and <i>obstructs</i> its ordinances.</p> <p>• [<i>Second Offence</i>. If unbeneficed, imp. for life; if beneficed, deprivation and imp. for one year, and for a <i>Third Offence</i> (if beneficed) deprivation and imp. for life.]</p>

<p>(1) <i>anyone pretending to use witchcraft, to tell fortunes, or discovering stolen goods by skill in any occult or crafty science, is guilty of an offence.</i></p> <p>(2) <i>the Book of Common Prayer, or causing any other service to be used in its stead.</i></p>	<p>Forfeiture of 100 marks. *</p>	<p>* [Second Offence. 400 marks. Third Offence. Forfeiture of all his goods and chattels and imp. for life.]</p>
<p>V. <i>Swearing and Cursing.</i></p> <p>(a) Every labourer, sailor or soldier who profanely swears is guilty of an offence.</p> <p>(b) So is every person under the degree of gentleman.</p> <p>(c) So is every gentleman or person of superior rank.</p>	<p>First Offence. Forfeiture of 1s.</p> <p>First Offence. Forfeiture of 2s.</p> <p>First Offence. Forfeiture of 6s.</p> <p>For second offence the sum forfeited is doubled, and for *</p>	<p>A justice of the peace or a peace officer hearing the offence committed is bound to institute proceedings against the offender; and if he neglects, the justice forfeits 5<i>l.</i> and the constable 40<i>s.</i> The statute regulating the law is 19 Geo. II. c. 21, and it is a pity that practically the provisions of this statute are a dead letter. Under the Navy Discipline Act, 1866, any person in the navy who profanely swears is subject to dismissal with disgrace from her Majesty's service or other punishment.</p>
<p>VI. <i>Witchcraft.</i></p> <p>(a) Anyone pretending to use witchcraft, to tell fortunes, or discover stolen goods by skill in any occult or crafty science, is guilty of an offence.</p> <p>(b) Any person using subtle craft, by palmistry or otherwise, to deceive the lieges, is deemed a <i>rogue</i> and a <i>vagabond</i>.</p>	<p>Imp.</p> <p>Imp. and hard labour.</p>	<p>* [subsequent offences <i>trebled</i>, with costs of conviction; on default of payment the offender is sent to the house of correction for 10 days.]</p> <p>Witchcraft or intercourse with evil spirits was once severely punished by our laws; the punishment for witchcraft being death, and for sorcery, pillory for the first offence and death for the second; but at the present time the only offences of the kind are those given in the first column.</p>
<p>VII. <i>Religious Impostors.</i> Anyone pretending an extraordinary commission from heaven, or terrifying or abusing the people with false denunciations of judgments.</p>	<p>Fine and imp. and corporal punishment.</p>	
<p>VIII. <i>Simony.</i> The corrupt buying and selling of holy orders constitutes an offence.</p>	<p>The particular presentation lapses to the crown, and both parties guilty forfeit double the value of the corrupt consideration.</p>	<p>See <i>ante</i>.</p>

## CHAPTER VII.—OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE—continued.

Offences, Definitions, &c.	Punishment.	Remarks.
<p><b>IX. Profanation of the Lord's Day.</b> To profane (or break) the Sabbath is an offence against religion. The following are instances in which the offence is committed:—</p> <p>(a) Anyone holding markets on Sunday or Good Friday.</p> <p>(b) Anyone holding any sport out of his own parish or any unlawful sport within his own parish on Sunday.</p> <p>(c) Any tradesman, &amp;c. doing work of his ordinary calling on Sunday (works of necessity and charity only excepted).</p> <p>(d) Any person exposing for sale any wares whatever on a Sunday.</p> <p>(e) Any drover coming into his inn on Sunday.</p> <p>(f) Any person serving or executing any process on Sunday (except for treason, felony, or breach of the peace).</p> <p>(g) Any person opening on Sunday a house used for public entertainment or public debate is guilty of keeping a disorderly house.</p> <p>(h) Selling on Sunday, Christmas Day, or Good Friday, intoxicating liquors during hours prohibited by the Licensing Acts.</p>	<p>Forfeiture of goods exposed for sale.</p> <p>Forfeiture of 3s. 4d. to the poor.</p> <p>Forfeiture of 5s.</p> <p>Forfeiture of the goods exposed.</p> <p>Forfeiture of 20s.</p> <p>The service or execution void.</p> <p>Fine and imp.</p> <p>Fine.</p>	<p>Notice carefully the advantages which are derived from laws requiring the Sabbath to be kept holy, pp. 238, 239.</p> <p>Instances c, d, e, f, are made offences by the Lord's Day Act of Charles II.'s reign (29 Car. II. c. 7). With regard to case o, the act speaks of a "tradesman, artificer, workman, labourer, or other persons whatsoever; the last words seem sufficient to include every one, but cases show that the courts have considered them to mean only persons of a similar nature to tradesmen, &amp;c., and therefore professional persons and farmers even are not within the spirit of the act. By a recent statute no one can be prosecuted under 29 Car. II. c. 7, without the written consent of the chief officers of the peace, or of two justices, or of a stipendiary magistrate. (34 &amp; 35 Vict. c. 87; 42 &amp; 43 Vict. c. 67.)</p>
<p><b>X. Sodomy, &amp;c.</b></p> <p>(a) The infamous crime against nature committed either with man or beast, and commonly known as buggery.</p> <p>(b) Assault with attempt to commit this crime is a misdemeanor.</p>	<p>P. S. for life—10 years.</p> <p>P. S. for 10—5 yrs., or usual imp.</p>	<p>A crime of so shocking a nature that it is not fit to be named among Christians. The punishment for it being so severe, a strict proof of the offence is necessary to convict.</p>
<p><b>XI. Sale of Unwholesome Provisions.</b> It is an offence to sell unwholesome or adulterated articles of food or drink, and particularly—</p> <p>(a) Anyone who mixes, colours, stains, or powders any articles of food with any ingredient injurious to health is guilty the first time of an offence.</p> <p>A second similar offence is a misdemeanor.</p>	<p>For first offence, a penalty not exceeding 50l. and for second offence 100l. b. 1. for 6 months.</p>	<p>These offences are now regulated by 38 &amp; 39 Vict. c. 63. The term "food" used in the Act includes every article used for food or drink by man, excepting drugs and water. Public analysts have been appointed under the Act, whose duties are to test the genuineness of articles sold.</p>

(b) Anyone knowingly selling articles so adulterated is similarly guilty.	Idem.	In connection with these nuisances notice particularly the provisions of 36 & 37 Vict. c. 38, p. 249, as to betting in streets and highways, and of the various statutory provisions relating to gaming given on pp. 247, 248, and in connection with them bear in mind that an innkeeper is liable to be indicted and fined if he <i>improperly</i> refuse to receive a guest into his inn.
(c) Anyone who so mixes, &c., with any ingredient, so as to affect injuriously the quality or potency of such drug with intent so to sell the same, is guilty of an offence.	Idem.	
(d) Anyone who knowingly sells a drug so adulterated is similarly guilty.	Idem.	
(e) Anyone who sells any article of food or drug not of the <i>nature, substance</i> , and quality of the article demanded by the purchaser, is guilty of an offence.	Penalty not exceeding 20 <i>l</i> .	
.....	.....	
XII. <i>Common Nuisance</i> , m. Anyone who does something to the annoyance of all the lieges, or neglects to do something which the common welfare requires, is guilty of a misdemeanor. Instances of common nuisances are—	Fine or imp.	Justices may, on oath being made to them, grant a warrant for search to be made for indecent prints, &c., in order that they may be seized and destroyed.
(a) Obstructing the highway, (b) carrying on dangerous or offensive trades, (c) exposing in a public road a person suffering from a contagious disease, (d) keeping disorderly inns and other houses, such as <i>burdy</i> and <i>gaming</i> houses, <i>booths for rope dancers and card players</i> , (e) lotteries, (f) making or storing gunpowder or fireworks elsewhere than in licensed places, (g) eavesdropping, (h) being a common scold.	Fine and imp., h. 1.	
XIII. <i>Lewdness</i> , m. Anyone who indecently exposes the person, or exposes for sale or sells indecent pictures, books, &c., commits this offence.		
XIV. <i>Drunkenness</i> .	Fine 5 <i>s</i> . 2 <i>nd</i> conviction: Security for good behaviour, with two sureties in 10 <i>l</i> . each to be found.	You will remember from an early part of this volume that drunkenness cannot be pleaded as an excuse for crime, and from this example you will see that drunkenness is in itself an offence. Of the instances given case (a) is governed by 4 Jac. 1, c. 5, and the fine goes to the use of the poor; case (b) is governed by 10 & 11 Vict. c. 89; and cases (c) and (d) are governed by the Licensing Act, 1872.
(a) To be drunk and not disorderly is an offence.	Fine 40 <i>s</i> ., and in default of payment 7 days' imprisonment.	
(b) To be drunk and to behave in a disorderly, indecent or riotous manner in a street is a great offence.		

CHAPTER VII.—OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE—*continued*.

Offences, Definitions, &c.	Punishment.	Remarks.
<b>XIV. Drunkenness—continued.</b> (c) To be found drunk on any highway or public place, or on any licensed premises, is an offence. (d) To be drunk or disorderly, or to be drunk while in charge of a horse, cattle or a steam-engine, or in possession of loaded firearms is a greater offence.	Penalty 10s. 2nd conviction within 12 months 20s.* The same as last, or imp. for not exceeding one month w. h. l. Imp. for two years, w. h. l.	*Subsequent convictions within same period 40s.
<b>XV. Wanton Driving, m.</b> Anyone who having charge of a carriage or vehicle, by wanton or furious driving, or racing, or other wilful misconduct or neglect, does bodily harm to any one is guilty of an offence. <i>Cruelty to Animals.</i> (a) Anyone who cruelly ill-treats, overdrives, abuses, or tortures any domestic animal, commits an offence. (b) Anyone not being duly licensed who performs on a living animal any experiment calculated to give pain is guilty of an offence under the Cruelty to Animals Act, 1876, and subject to heavy penalties.	Fine 5l. and 10l. or less to the owner of the animal if the same is injured.  Fine and imp.  Fine and imp.	If life is destroyed by such wanton acts the offence becomes manslaughter, and is punishable accordingly. A bicycle has been held to be a vehicle, so as to make a bicycle rider subject to penalties if he rides (as he is apt to do) in a careless, wanton, and negligent way, and thereby hurts another.  Cock-fighting, bull-baiting, and subjecting animals to unnecessary pain by removing them when unwell, fall under this offence.
<b>XVI. Disinterment of Bodies, m.</b> Anyone who disinters, or refuses to inter, a dead body, commits this offence. <b>XVII. Refusal to serve a Public Officer, m.</b> Anyone who refuses to serve as a public officer, <i>e.g.</i> as an overseer or constable, commits this offence.	Fine and imp.  Fine and imp.	It makes no difference whether the disinterment is for dissecting purposes or not.
<b>XVIII. Vagrancy.</b> Persons who "wake in the night and sleep in the day, and haunt custom-able taverns and alehouses, and routs about, and no man knows wot from they come ne whether they go," commits an offence, and are punishable as— (a) <i>Idle and disorderly persons</i> ..... (b) <i>Rogues and vagabonds</i> ..... (c) <i>Incorrigible rogues</i> .....	Imp. for 1 month and h. l. Imp. for 3 months and h. l. Imp. for 1 year and h. l. and w.	

Offences, Definitions, &c.	Punishment.	Remarks.
<p>I. <i>Injuries, &amp;c., to Records, &amp;c.</i></p> <p>(a) To steal, injure or falsify a record, e.g. panels, writs, affidavits, &amp;c. of any court of law or equity, is felony.</p> <p>(b) To forge records is by statute made felony . . . .</p>	<p>P. S. for 5 years, or usual imp.</p> <p>P. S. for 7—5 years, or usual imp.</p>	
<p>II. <i>Outrages in the Superior Courts, &amp;c.</i></p> <p>(a) To draw sword, or strike a blow, or assault a judge in court, is an offence of a highly penal nature.</p>	<p>Imp. for life, loss of right hand, forfeiture of goods, and of profits of lands for life.</p> <p>Fine and imp.</p>	<p>To use threatening words to a judge is high misprison and punishable with fine, imprisonment and corporal punishment.</p>
<p>III. <i>Intimidating Parties or Witnesses.</i></p> <p>(a) To practise intimidation, or other improper behaviour towards the parties or witnesses in a proceeding in a court of justice is a high misprison and contempt.</p> <p>(b) To bribe or otherwise corruptly influence a juror, is a similar offence, and is known as <i>embracery</i>.</p>	<p>Idem.</p>	
<p>IV. <i>Obstructing Arrests or Process.</i></p> <p>(a) To obstruct a lawful arrest, or the execution of a lawful process, is an offence of a high and presumptuous nature, and the offender becomes an accessory in felony, and a principal in treason, and punishable accordingly.</p> <p>(b) To obstruct a peace officer in the due execution of his duty is made a misdemeanor by statute.</p>	<p>Usual imp.</p>	<p>Note carefully what places were formerly sanctuaries of iniquity, and why so, p. 363.</p>
<p>V. <i>Escape and Prison Breach.</i> The person escaping, and the officer permitting the escape, are both guilty of an offence against justice:—</p> <p>(a) <i>As to the officer guilty of the escape.</i></p> <p>(i) The escape may arise from his <i>negligence</i> only.</p> <p>(ii) Or it may arise from his <i>connivance</i>, when he is punishable as for the crime for which the prisoner has been committed to gaol, or for which arrested.</p>	<p>Fine.</p>	

CHAPTER VIII.—OF OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND THE MAINTENANCE OF PUBLIC ORDER—*contd.*

Offences, Definitions, &c.	Punishment.	Remarks.
<p>V. <i>Escape and Prison Breach</i>—continued.</p> <p>(b) <i>As to the prisoner guilty of the prison breach.</i></p> <p>(i) If he is in prison for treason or felony, the offence is felony.</p> <p>(ii) If he is in prison for any inferior crime, the offence is a high misdemeanor.</p> <p>(iii) If a convict under sentence of penal servitude is found at large before his sentence has expired (not having obtained a ticket of leave), he is guilty of a serious offence.</p>	<p>P. S. 7—5 years, or</p> <p>Fine and imp.</p> <p>P. S. life—5 years, or usual imp.</p>	<p>usual imp. and s. c. and w. w.</p>
<p>VI. <i>Rescue, f.</i> To forcibly and knowingly free or rescue (i) prisoners committed for or convicted of murder; (ii) prisoners sentenced to penal servitude; (iii) prisoners of war, is a felony.</p>	<p>P. S. life—5 years, or usual imp.</p>	<p>In the case of prisoners sentenced to penal servitude the term of penal servitude may be preceded by 4 years' imprisonment with hard labour.</p>
<p>VII. <i>Taking Reward for Stolen Goods, f.</i> To take a reward under the pretence of helping the owner of stolen goods to their restoration is a felony.</p>	<p>P. S. 7—6 years, or usual imp. and s. c. and w.</p>	<p>This offence was very common in Geo. I.'s reign. By means of it the owners of stolen property were enabled to recover back their goods at half-price, and thus induced to hush the theft up.</p>
<p>VIII. <i>Compounding a Felony, f.</i></p> <p>(a) To take a reward for forbearing to prosecute a felony is an offence.</p> <p>(b) To advertise offering a reward for the return of stolen property, no questions being asked, &amp;c., is an offence by advertiser, printer, and publisher.</p>	<p>Fine and imp.</p> <p>Fine of 50<i>l.</i> each.</p>	<p><i>Theft-bote</i> is a common species of the offence; it consists of the party robbed receiving back his goods in consideration of his agreeing not to prosecute the thief.</p>
<p>IX. <i>Misprision of Felony.</i> To conceal a felony (not amounting to treason), committed by some third person, is an offence.</p>	<p>If offender is a public officer: imp. for a year and a day*</p> <p>.....</p> <p>Fine of 10<i>l.</i> and imp., and further fine and disability to sue on any statute.</p> <p>Idem.</p>	<p>* [If offender is a common person: Imp. for less, but discretionary period.]</p> <p>In both cases: Fine and ransom at the sovereign's (judge's) pleasure.]</p> <p>Notice the difference between the law of compounding felonies and misdemeanors. The latter can, by leave of the court, be compounded before judgment is pronounced, and on the prosecutor stating that he is satisfied, a trivial punishment is awarded. Note what Blackstone says on this practice. (See footnote on p. 271.)</p>
<p>X. <i>Compounding Informations and Misdemeanors.</i>.....</p> <p>(a) To compound an information on a penal statute is an offence, because it contributes to make the laws odious to the public.</p> <p>(b) To compound a misdemeanor is an offence if done without the leave of the court.</p>		

<p>(a) To frequently stir up and incite suits and quarrels between her Majesty's subjects, either at law or otherwise, is an offence.</p>	<p>Fine and imp., and if the barrator is a solicitor he is unable to practise in future, and liable to P. S. 7—5 years.</p>
<p>(b) To sue another in the name of a fictitious person is, in a superior court, a high contempt.</p> <p>(c) To sue in an inferior court is an offence.</p>	<p>At the court's discretion.</p> <p>Imp. for 6 months, and damages to the injured person.</p>
<p>XII. <i>Maintenance</i>. To officiously intermeddle in an action that in no way belongs to the intermeddler by maintaining or assisting either party to prosecute or defend it is an offence.</p>	<p>Forfeiture 10<i>l.</i>, and fine and imp.</p>
<p>XIII. <i>Champerty</i>.</p> <p>(a) To maintain an action for a plaintiff or defendant on an understanding, that, if the person maintained is successful the person maintaining is to share the spoil, is an offence.</p> <p>(b) To sell or purchase pretended titles to land before the vendor has received the profits of the land for one year, or been in actual possession of the land or of the reversion, is an offence.</p>	<p>Forfeiture, by both parties to the agreement, of a third of their goods.</p> <p>Forfeiture, by vendor and purchaser, of the value of the land.</p>
<p>XIV. <i>Conspiracy</i>, m.</p> <p>(a) For two or more persons to agree to carry out something hurtful to an individual or class, or the public at large, is a misdemeanor.</p>	<p>Fine and imp. w. h. l.</p>
<p>(b) To conspire to murder a person, whether a British subject or a foreigner, is a misdemeanor.</p>	<p>P. S. 10—5 years, or usual imp.</p>
	<p>A man is not guilty of the offence who maintains the suit of his near relation, or servant, or poor neighbour—acts of charity and compassion.</p>
	<p>You will observe that maintenance and champerty are closely allied, the main difference being that in champerty the person rendering assistance is to share the profits of the action (hence the term champerty, <i>campi partitio</i>, a division of the spoil), while in maintenance there is no such intention.</p>
	<p>If the object of the conspiracy is felonious and is effected the offence is then a felony. The most common instance of this offence is to falsely and maliciously conspire to indict an innocent man, for which at common law the guilty parties received the "villainous judgment." (Note carefully what the effect of this judgment was, see p. 275.)</p>
	<p>Note also the provisions of the Trade Union Act, 1871 (34 &amp; 35 Vict. c. 31), and 38 &amp; 39 Vict. c. 86, protecting agreements between employers and workmen from being the subject of prosecution as conspiracies, p. 277.</p>



CHAPTER VIII.—OF OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND THE MAINTENANCE OF PUBLIC ORDER—*contd.*

Offences, Definitions, &c.	Punishment.	Remarks.
<p>XV. <i>Perjury</i>, m. An offence committed when a lawful oath is ministered by <i>any one that hath authority</i> to any person on any <i>judicial</i> proceeding who sweareth <i>absolutely</i> and <i>falsely</i> in a matter <i>material</i> to the <i>issue</i> or cause in question.</p> <p>To suborn (procure) persons to commit perjury is also an offence.</p>	<p>7 years in the house of correction, or P. S. 7—5 years w. h. l.</p> <p>Idem.</p>	<p>Notice carefully the words in <i>italics</i> in the definition. A Quaker, Moravian, or other person <i>offering</i> falsely are equally liable to the penalties of perjury; so are persons who, owing to their <i>not</i> believing in a God, make a solemn declaration under 32 &amp; 33 Vict. c. 68.</p> <p>The decision recently given by the Court of Error with regard to the prosecution of Arthur Orton, otherwise Tichborne, for perjury, is useful, as it shows that distinct charges for perjury may be contained in different counts of the same indictment, and that a sentence of 7 years P. S. may be passed for each perjury committed.</p>
<p>XVI. <i>Bribery</i>.</p> <p>(a) Any judge taking any undue reward to influence his behaviour in his office, and any person offering such reward is guilty of an offence.</p> <p>(b) Any inferior officer concerned in the administration of justice taking such reward with the same object, and any person offering the same, is also guilty of an offence.</p>	<p>The judge forfeits treble the bribe and is discharged from office; the briber suffers fine and imp.</p> <p>Fine and imp. of both giver and receiver.</p>	<p>The Criminal Code Commissioners suggest that the punishment for corruption in ministerial officers is not sufficiently severe. They make a similar suggestion with regard to the punishment for perjury.</p>
<p>XVII. <i>Negligence of Public Officers</i>. Sheriffs, coroners, constables, and the like, who neglect their public duties, are guilty of an offence.</p>	<p>Fine, and, if the negligence be very notorious, forfeiture of office.</p>	
<p>XVIII. <i>Oppression by Judges</i>. Judges, justices, and other magistrates who use oppressive or tyrannical arbitration in the administration and under colour of their office are guilty of a high misdemeanor.</p>	<p>Fine, imp. and forfeiture of office.</p>	
<p>XIX. <i>Extortion</i>. An officer under colour of his office taking that is not due to him, or more than is due, or before it is due, be guilty of an offence.</p>	<p>Fine and imp., and occasionally forfeiture of office.</p>	

## Chapter IX.—Of the Means of preventing Offences.

## REMARKS.

“Prevention is better than cure,” and the author of the Commentaries draws attention to the excellency of our law in providing a means whereby the commission of offences may be prevented, as well as a means for punishing offences which have taken place.

The prevention is effected by the offender being bound over by recognizances, with sureties in a certain sum of money *to keep the peace*, or for *good behaviour*, during a certain period, or forfeit the money secured. Justices may by virtue of their commission, at their own discretion, on a proper application made to them, demand this security. In the case of a demand being made and refused by the justices, a *supplicavit* or mandatory writ can be obtained from the Queen’s Bench to compel the justices to comply, or the Queen’s Bench may order the security themselves (the usual course). The justices’ jurisdiction extends to all *commoners*, but not to peers or peeresses who can only be bound over in the Queen’s Bench.

Wives may demand this security from their husbands and husbands from their wives. Infants are bound only by their next friend.

You must notice with care (a) the cases in which (i) recognizances for keeping the peace, and (ii) recognizances for future good behaviour, can be ordered to be entered into; (b) the various ways in which these recognizances may respectively be forfeited; (c) the fact that no one can be imprisoned for longer than a year for not finding sureties.

## TEST PAPER TO WORK OUT.

1. Enumerate the various acts which amount to treason at the present time.

2. Define the offence of *præmunire*, and state its punishment.

What is the origin of the name of the offence, and why is it that it still causes a forfeiture of property notwithstanding the Felony Act, 1870 (33 & 34 Vict. c. 23)?

3. Distinguish (a) maintenance and champerty; (b) Perjury and subornation of perjury; (c) Riots and routs.

4. Distinguish an affray from an assault.

5. A., her husband not having been heard of for nine years, marries B. Five years after her second marriage her true husband comes

home. Is A. guilty of bigamy? Would the children of A. and B. be legitimate?

6. Mention some offences partaking of "lewdness," which are punishable by our law.

7. How are idle persons and vagabonds defined by our ancient statutes?

8. Mention three ways in which a recognizance for good behaviour may be forfeited.

### Sixteenth Week's Work.

CHAPTER X.—*Of the Courts of a Criminal Jurisdiction.*

XI.—*Of Summary Convictions.*

XII.—*Of Arrests.*

XIII.—*Of Commitment and Bail.*

XIV.—*Of the several modes of Prosecution.*

XV.—*Of Process and herein of Certiorari.*

XVI.—*Of Arraignment and its Incidents.*

XVII.—*Of Plea and Issue.*

Chapter X.—*Of Courts of a Criminal Jurisdiction.*

#### REMARKS.

Bearing in mind the distinction which exists between civil Courts and criminal Courts, viz., that the rule existing in civil Courts, that the sentence of one Court of an inferior nature can be controlled by the sentence of another Court of a superior nature, has no application to criminal Courts; you must get up very carefully the jurisdiction possessed by each criminal Court given in this Chapter.

These Courts are:—

I. THE HIGH COURT OF PARLIAMENT—the highest Court in the kingdom—has jurisdiction to try great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

Peers can be impeached for all offences, but commoners only for high misdemeanors, and not for offences capital.

The articles of impeachment are a kind of indictment found by the commons and tried by the lords.

All indictments found against peers and peeresses during a session of parliament for treason or felony (or misprision thereof) are removed to this Court by writ of certiorari.

## II. THE COURT OF THE LORD HIGH STEWARD OF GREAT BRITAIN.—

This Court is instituted for the trial of all peers and peeresses indicted for treason or felony (or misprision thereof) during the recess of parliament; for to such indictments a peer cannot plead guilty or not guilty (though he can plead a pardon if the indictment is laid in the Queen's Bench), but the matter must be removed to the Court, being considered for trial. The Lord High Steward is appointed by the sovereign for the trial of each indictment so removed; the peers are summoned twenty days before the trial. The Lord High Steward is the judge of the law and the peers triers of the fact. All peers who attend and take the proper oaths can vote at the trial, and the decision of the majority binds. No conviction, however, can be made unless twelve peers at least are in favour of it.

[N.B.—*During sessions* peers are tried for felony or treason by the *House of Lords*, and the peers are sole judges of law and fact; but *during recess* the trial takes place before a special Court (the Court of the Lord High Steward is constituted for such trial), and then the peers are the judges of facts only, and the Lord High Steward of the law.]

## III. THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE,

on its Crown side, has jurisdiction over all criminal causes from treason to the smallest breach of the peace. Proceedings may also be removed into this Court under the following circumstances:—(a) When against bodies corporate, as they cannot appear by attorney in the Court below; (b) when a fair and impartial trial cannot be had in the Court below; (c) when a difficult or important question of law is involved; (d) when a view of the premises is required; (e) when a special jury is asked for at the trial.

The jurisdiction of the Crown side of the Queen's Bench also includes jurisdiction over crimes committed on the seas or coasts, a jurisdiction formerly vested exclusively in the Court of Admiralty,—a jurisdiction which was much disliked, inas-

much as the offender was tried by a judge alone, and had not an Englishman's right of being tried by a jury of his country; and in Henry VIIIth's reign the jurisdiction was transferred to the commissioners of oyer and terminer, afterwards to the Central Criminal Court, and ultimately to any justice of assize, oyer, or terminer, and gaol delivery (Courts to be considered directly).

The jurisdiction of the foregoing Courts extends to crimes committed all over the kingdom, but that of the following Courts is local only.

IV. COURTS OF OYER AND TERMINER, AND GAOL DELIVERY.—These Courts, which are more commonly known as Courts of Assize, are held before Royal Commissioners (chosen generally from the judges of the Common Law Divisions of the High Court, and from the judges of the Court of Appeal), twice at least in every county at what are called “the assizes.”

These Royal Commissioners sit by virtue of four commissions, viz. (1) The commission of *Nisi Prius* (this is of a civil nature, and was treated of in Volume III.); (2) The commission of *oyer and terminer*, “to hear and determine,” which extends to the cases of all offenders indicted at the assizes; (3) The commission of *general gaol delivery*, authorizing the trial of all prisoners in gaol at the assizes; (4) The commission of the peace.

For the trial of offences committed in the Metropolis and in certain suburban parts of Essex, Kent, and Surrey, a special Court has been formed by 4 & 5 Will. IV. c. 36, called the *Central Criminal Court*, into which the sovereign may issue its commission of oyer and terminer and gaol delivery. This Court sits twelve times at least in every year.

[Note carefully the judges composing this Central Criminal Court, and bear in mind that any *two* of them constitute a Court. See p. 311.]

V. THE COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.—

These Courts are held, at four (stated) times in the year in every county, before two or more justices of the peace. [Note the *times* of the year when held, p. 312.] These Courts try nearly all smaller felonies, but they cannot try felonies of

deeper dye, such as treason, murder, or other capital offence, or any felony punishable with penal servitude for life; nor can they try the various offences enumerated in 5 & 6 Vict. c. 38 (set out in foot-note (*k*) on p. 313—these must be got up); nor can they try any newly-created offence unless express power to do so is conferred upon them.

The offences which in particular come before these Courts are those relating to the game laws, highways, bastards, poor, servants, and apprentices.

The proceedings are by indictment, appeals from the justices themselves, or summarily by motion and order. The orders made by this Court may be removed into the Queen's Bench Division by certiorari, and there quashed or confirmed.

The records of the sessions are kept by the *custos rotulorum*.

[Note who holds this office (p. 314), and note what appears in the Commentaries on p. 315, as to the sessions in Middlesex, and as to the sessions of certain boroughs.]

VI. THE COURT OF THE CORONER.—Having jurisdiction when any one dies in prison, or comes to a sudden or violent death, to find the cause of death.

VII. THE SHERIFF'S TOURN OR ROTATION.—Held twice a year before the sheriff in different parts of the county, it being his *turn* to keep a Court leet in each respective hundred. Out of this great Court leet arose for the ease of the sheriff the next Court considered, namely—

VIII. THE COURT LEET, OR VIEW OF FRANK PLEDGE.—A Court of Record held once a year within a particular hundred, lordship, or manor, before the steward of the leet.

The business of these Courts gradually fell into disuse, and has, in late years, been almost entirely absorbed by the Courts of Quarter Sessions.

IX. THE COURT OF THE CLERK OF THE MARKET tries misdemeanors committed in fairs and markets. It is the most inferior Court in the kingdom, and its chief jurisdiction, connected with *measures* and *weights* used in the fair or market, has lately been taken away; all such offences being triable now by a Court of *summary jurisdiction* (to be treated of in the next Chapter).

X. **THE COURT OF THE LORD HIGH STEWARD OF THE KING'S HOUSEHOLD.**—Formerly tried (for its jurisdiction has long fallen into entire disuse) offences committed within the king's palaces and houses.

XI. **THE COURTS OF THE UNIVERSITIES OF OXFORD OR CAMBRIDGE.**—For trying all offences committed by members of the University.

If the offence is a misdemeanor, the Chancellor's Court determines the matter; but treason, felonies, mayhem, are decided by the Court known as the Court of the Lord High Steward, who acts by a special commission under the Great Seal, being first approved by the Lord Chancellor. The Lord High Steward cannot inquire into the matter in the first instance, but an inquiry is had at the assizes before a grand jury, and if a true bill is found there, the hearing of the case takes place before the Lord High Steward.

[Note carefully the process of the trial set out on p. 322.]

#### POINTS TO NOTE.

- I. In connection with offences committed by peers, what the rules on the following points are:—(a) In what Court or Courts a peer can plead (i) guilty or not guilty, (ii) a pardon to or for an offence committed by him; (b) Whether bishops can sit at the trial of capital offences in the House of Lords; (c) Whether bishops accused of crime can claim the right to be tried by the lords or not.
- II. What you know of the Court of Star Chamber; when created and when abolished, and what jurisdiction it possessed.
- III. For what purposes, even at the present time, Courts leet are held.
- IV. To what civil Court the Court of the clerk of the market bears a resemblance.
- V. In connection with Courts of Quarter Sessions, what the duties of (a) the clerk of the peace, (b) *custos rotulorum* are.
- VI. How far the jurisdiction of the criminal Courts have been extended by the Territorial Waters Jurisdiction Act, 1878.

**Chapter XI.—Of Summary Convictions.****POINTS TO NOTE.**

- I. Into what two kinds of proceedings Courts of criminal jurisdiction are divided.
- II. Explain fully the term “summary proceeding.”
- III. Show how summary proceedings are beneficial to offenders.
- IV. Enumerate the various offences which may be the subject of summary proceedings.
- V. In what cases of assault justices of the peace have no jurisdiction.
- VI. In cases of assault which can be the subject of a summary proceeding, what punishment can be awarded.
- VII. In what cases justices of the peace can summarily dispose of cases of larceny.
- VIII. How far the last point has been affected by the Summary Jurisdiction Act, 1879.
- IX. What the other important provisions of the Act of 1879 are.
- X. By what other important statutes summary proceedings are regulated besides the Act of 1879.
- XI. What the course of procedure before a Court of summary jurisdiction is.
- XII. What the difference between a justice’s *summons* and a justice’s *warrant* is, and in what case a justice is justified in issuing a *warrant* in the first instance.
- XIII. Within what time of the commission of the offence proceedings in a summary Court must be taken.
- XIV. Whether or not a defendant against whom a charge in a Court of summary jurisdiction is dismissed, can demand a certificate showing the fact.
- XV. Whether a Court of summary jurisdiction has any power to award costs of the proceedings to either party, and if so, by what means the payment of them can be enforced.
- XVI. In what cases and to what Court an appeal from the decision of a Court of summary jurisdiction lies.
- XVII. What right is conferred on defendants who are dissatisfied with the decision of a Court of summary jurisdiction, on some point of law or question of jurisdiction, by the Act of 1879.



- XVIII. In what summary way matters relating to the *excise* are determined.
- XIX. In what way contempts of Court are punished.
- XX. What the distinction between *direct* and *consequential* contempts of Court are.
- XXI. Enumerate the principal contempts which are punished by attachment.  
[Read and get up the list given on pp. 335, 336.]
- XXII. Whether the power of punishing contempt by attachment is of recent or ancient origin.
- XXIII. In what cases a party guilty of contempt cannot be immediately apprehended.
- XXIV. In other cases (*i. e.* where the offender cannot be apprehended at once) what course is adopted, and what the object of it is.
- XXV. Give an outline of the proceedings to obtain an attachment for contempt.
- XXVI. When a person is considered guilty of "a high and repeated contempt."
- XXVII. What the punishment for contempt is.
- XXVIII. Whether a peer is exempted from attachment for contempt.

#### Chapter XII.—Of Arrests on Criminal Charges.

##### REMARKS.

Arrest, in the sense used in this Chapter, is the apprehending or restraining of a man that he may be forthcoming to answer some alleged crime. It is either (a) on *warrant*, or (b) *without warrant*.

- (a) Warrants are usually issued by justices of the peace, and authorize the officer to arrest the person named therein. A justice's warrant extends to one county only, but it may be indorsed by a justice of another county, and then it has force in that county also (this is called "backing" the warrant). A warrant extending over the whole kingdom may be obtained from the Queen's Bench Division.
- (b) An arrest without warrant is allowed under the following circumstances:—
- (1) *Justices of the peace* may apprehend persons committing a felony or breach of the peace in their presence.

(2) *Sheriffs* and *coroners* may arrest any felon within their county.

(3) Constables may arrest (i) persons who, in their presence, or whom they have reasonable grounds to suppose have committed treason, felony, or a breach of the peace; (ii) persons found loitering in private places by night.

(4) Private persons may arrest (i) felons who commit a felony in their presence; (ii) persons committing indictable offences by night; (iii) persons committing malicious injuries to their property; (iv) persons against whom a "hue and cry" has been raised.

[N.B.—Any one wantonly raising this cry is punishable by fine and imprisonment.]

#### POINTS TO NOTE.

- I. What the eleven general heads are under which the proceedings in criminal Courts are carried on.
- II. Whether or not warrants to arrest can be obtained elsewhere than from justices or the Queen's Bench Division.
- III. Whether or not an outer door can be broken open in order to effect an arrest under a warrant, and whether there is any difference in this respect whether the person arresting is a private person or a constable.
- IV. What the "extradition" of criminals signifies, and what the main provisions of the Extradition Treaties are.
- V. Whether under these treaties fugitive criminals can be surrendered for political offences.
- VI. In what cases arrests may be made *without warrant* by the following persons: (a) justices; (b) constables; (c) private persons.
- VII. What the difference is between the result of a private person and a constable respectively arresting an innocent person.
- VIII. What statutory provisions have been made with the view of encouraging persons to apprehend offenders.

## Chapter XIII.—Of Commitment and Bail.

## REMARKS.

When an arrest has been made, the offender must be carried before a justice, in order that the circumstances of the offence may be inquired into, and the offender either *committed* or let out on *bail* or *discharged*. The justices' duties at the examination are—

- (a) To take the evidence of those who can speak to the facts on oath.
- (b) To have the evidence put into writing and signed, first by the witnesses and then by himself.
- (c) To have the evidence read to the person charged, and ask him whether he has anything to say concerning the matter; warning him, that whatever he does say will be used against him at the trial, and that he has nothing to hope from any promise, or to fear from any threat, which may have been held out to him.
- (d) To have accused's reply (if one) written down, and then read over to him, and then to be signed by him (the justice).
- (e) To ask the accused if he has any witnesses to call, and, if so, to take their evidence in the manner above mentioned.
- (f) If the evidence is insufficient, to either *discharge* the accused or *remand* him for not more than *eight* days.
- (g) If the evidence is sufficient for a trial to be had upon it, either to *commit* the accused to prison, or *bail* him, in order that he may be tried at the next sessions or assizes.

[Note particularly the cases in which a justice respectively *must*, *may* and *cannot* allow a prisoner to go at large on *bail*. Page 352.]

- (h) To, if he think fit, bind the prosecutor and the witnesses by recognizance to prosecute and give evidence at the trial.

## POINTS TO NOTE.

- I. Whether a magistrate incurs any liability by taking insufficient bail.
- II. Whether or not there is any appeal from a justice's decision as to bail.
- III. Whether a justice, or the Queen's Bench Division, can allow bail in case of (a) treason, (b) murder.

IV. For what *misdemeanors* justices are not obliged to take bail.

V. Whether or not an accused person is entitled to copies of the depositions taken, and, if so, on what conditions.

**Chapter XIV.—Of the several Modes of Prosecution.**

**REMARKS.**

The next step in criminal proceeding after the arrest and commitment is the *prosecution*, and this may be either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding.

The former (and usual) way is *either* (a) *by presentment*, or (b) *by indictment*.

(a) By presentment,—this is a comprehensive term, but here means the notice taken of some offence by the grand jury of their own knowledge, without any bill of indictment being laid before them.

(b) An indictment is the written accusation preferred to and presented on oath by the grand jury.

[NOTE.—Twenty-four grand jurymen are returned to the assizes or sessions by the sheriff; twelve at least, and not more than twenty-three, of whom receive the bill of indictment, and hear evidence in support, and, if the majority of them are satisfied that there is a case for trial, indorse the indictment “a true bill;” if not so satisfied, they indorse it “not a true bill,” or “not so found.”]

Indictments must show—(i) the *venue* (*i. e.* the place where the offence was committed); (ii) the christian and surname of the defendant; (iii) the time and place of the commission of the offence; (iv) the *nature* of the offence. [NOTE.—This last must be set out with certainty and clearness, and in several cases technical terms *must* be used, see p. 366]; (v.) the *conclusion*, this for common law offences runs thus: —“Against the peace of our sovereign lady the Queen, her crown and dignity.”

[Note the various provisions allowing amendments to be made in criminal pleadings, &c., in order to prevent the trial failing through some technical defect.]

With regard to prosecution without a previous finding to the grand jury, the only species now existing, is—

(c) Information,—a complaint in the Queen’s Bench Division made by the Crown of some offence not amounting to a felony.

The information is filed either by the Attorney-General, on behalf

of the Crown, in all cases where the offence deserves prompt punishment, owing to its tendency to disturb or endanger the government, or it is filed by the Master of the Crown Office (the sovereign's coroner and attorney), at the instance of some private person (known as a *relator*), in cases of gross and notorious misdemeanors, such as libels, riots, and other offences of an atrocious kind, which, owing to their magnitude, require speedy and public animadversion.

In these latter cases, the person aggrieved applies to the Queen's Bench Division for a rule to call on the offender to show cause why the information should not issue; and, if no cause is shown, the information is filed, and is tried by a petty jury at the assizes; or, if the matter is of special importance, *at bar* in London, either by a special or common jury as a civil action.

#### POINTS TO NOTE.

- I. What (a) the qualifications for, (b) the powers and duties of, the grand jury in criminal proceedings are.
- II. In what offences it is necessary to use certain technical words descriptive of the offence in the indictment.
- III. What some of the chief of the statutory provisions relating to the amendments of indictments are.
- IV. The evidence against a man charged for a *misdemeanor* proves that he committed a *felony*—whether the prisoner will be acquitted or not.
- V. What the mode of prosecution was against a thief who was taken *with the mainour*, and what this expression signifies.
- VI. In what offences a prosecution by way of appeal was allowed, and when such prosecution was abolished.

#### Chapter XV.—Of Process, and herein of Certiorari.

##### REMARKS.

The process whereby a prisoner is brought up to the Court for trial of the offence charged against him in the *indictment*, is either by *writ of capias* or by a *justice's warrant*. If the defendant cannot be found, he may be *outlawed* (the term is *waived* in the case of a woman). In felonies a *capias* at once issues, and outlawry follows; but in misdemeanors a more tedious process has to be gone through before the outlawry is effected. (See p. 381.)

Before the trial, or at any time before judgment, application by either prosecutor or accused may be made to the Queen's Bench Division to remove the indictment from any inferior criminal Court into that Division. It is granted for one of the four purposes set out on p. 283 (note these particularly).

The process on *informations* is in general similar to that on indictments, but it commences by *subpœna*, and, on non-appearance by the defendant, a *capias* issues. With a view to outlawry, the first step is by *venire facias*, and not by *subpœna*.

#### POINTS TO NOTE.

- I. What *bench warrants* are, and what the provisions of 11 & 12 Vict. c. 42, as to justices' warrants for the apprehension of persons at large, against whom indictments are found.
- II. By what means a person who is already in prison is brought up for trial on an indictment charging him with the commission of some other offence.
- III. What the steps are by which a person accused of a *misdemeanor*, and who eludes apprehension, is made an outlaw.
- IV. What the effect of outlawry is, and by what means the outlaw obtains his discharge.
- V. In order to obtain a writ of *certiorari facias*, removing criminal proceedings into the Queen's Bench Division, what the applicant must be prepared to prove.
- VI. *How* this *certiorari* is obtained.
- VII. Whether security has to be given by the applicant for a *certiorari*, and in what case no security is required.
- VIII. What the statutory provisions as to the trial of offences removed into the Queen's Bench by *certiorari* are.

#### Chapter XVI.—Of Arraignment and its Incidents.

##### REMARKS.

At the trial the accused appears, and is *arraigned*, that is, he is called upon by name to answer the matters charged against him in the indictment.

The indictment is read to him, and the prisoner is asked whether he is *guilty* or *not guilty*. To this he may *stand mute*, when a plea of "not guilty" is entered for him, unless there is a question of his

sanity, when that question must be decided by a jury at once; or he may *confess* the indictment, when, unless he withdraws the confession—a course the Court usually advises him to adopt,—judgment is awarded. This is a simple confession. Another and more complicated species of confession is known as *approvement*, when the accused, before plea pleaded, confesses the fact, and accuses others, his accomplices, of committing the offence, with the view of obtaining his pardon. This approvement has long since been disused, and when used was only allowed in cases of capital felonies.

But it often happens even at the present time that justices offer pardon to an accomplice if he will give full evidence against the other prisoners at the trial. This evidence is known as the Queen's Evidence, and if not sufficient to convict, the man is liable to be tried and convicted on his own confession. Moreover, the pardon is not of force unless confirmed by the judges of gaol delivery.

#### POINTS TO NOTE.

- I. When a prisoner is said to "stand mute."
- II. What course was formerly adopted, when in felony a prisoner "stood mute," with the view of making him plead; whether or not the strange course adopted could properly be called using the "rack."
- III. In connection with the arraignment of prisoners what the terms "holding up the hand," "trina admonitio," "approver," "appellee," respectively mean.

#### Chapter XVII.—Of Plea and Issue.

##### REMARKS.

The usual course adopted by prisoners when arraigned is to put in their plea or answer to the charge, and the various criminal pleas are—

- (a) A plea to the jurisdiction—rarely used for reasons given on p. 397.
- (b) A demurrer—by which the defendant admits the fact, but takes exception to the sufficiency of the charge on the face of it, *e. g.* when he says that the facts stated in the indictment do not constitute the offence alleged.

- (c) A plea in abatement (practically not now allowed)—used when the prisoner said that his name or addition was wrongly stated.
- (d) A plea in bar. These pleas are principally of four kinds, namely:—
  - (i) *Autrefois acquit*, or former acquittal.
  - (ii) *Autrefois convict*, or former conviction—for no man can be twice brought into danger for the same crime. If the former conviction was for a capital offence, then the plea put in is—
  - (iii) *Autrefois attain*.
  - (iv) A pardon.

These are uncommon pleas. The ordinary plea is—

- (v) The general issue, or the plea of *not guilty*; and this plea may be pleaded with the first two mentioned, namely, *autrefois acquit* and *autrefois convict*.

The effect of this last plea is to put the prosecutor to the proof of every material fact in the indictment or information, and to allow the defendant to avail himself of any defence or circumstance equally as if he had pleaded it specially, and thus it is by far the best plea for a prisoner to put in. By it the prisoner put himself upon the trial by jury, and the prosecutor “doth the like,” or, as it is called, adds the “*similiter*.”

#### POINTS TO NOTE.

- I. What the nature of a plea to the jurisdiction is, and why rarely used.
- II. Whether or not a prisoner after demurring, and the demurrer being overruled, can plead not guilty.
- III. Why demurrers to indictment are seldom used.
- IV. Why prior to 1870 it was advisable to plead a pardon before sentence passed.
- V. Distinguish special pleas and general pleas.
- VI. Discuss the nature of declaratory pleas of sanctuary and of benefit of clergy.
- VII. What Blackstone’s statement on the law of sanctuary is.
- VIII. What the origin of the terms “culprit” and “oyer” is.



## TEST PAPER TO WORK OUT.

1. Mention the various Courts of criminal jurisdiction, distinguishing those which have a local jurisdiction only.
2. Give the principal provisions of the Summary Jurisdiction Act, 1879.
3. Give the eleven general heads in their progressive order of the ordinary proceedings in criminal Courts.
4. In what cases is (a) a private person, (b) a constable, justified in arresting an offender?
5. In what cases is a justice of the peace obliged to allow a prisoner out on bail, and when has he a discretion in the matter?
6. Explain shortly the duties of a grand jury at an assize trial.
7. Give a short account of the usual proceedings which take place at the trial of a prisoner for a misdemeanor or felony at the assizes from beginning to end.
8. What do you understand by the prisoner's "plea"? Mention the various kinds of criminal pleas, and explain each kind shortly.

## Seventeenth Week's Work.

CHAPTER XVIII.—*Of Trial and Conviction.*

- „ XIX.—*Of Judgment and its Consequences.*  
 „ XX.—*Of Reversal of Judgment.*  
 „ XXI.—*Of Reprieve and Pardon.*  
 „ XXII.—*Of Execution.*

## THE CONCLUSION.

Chapter XVIII.—*Of Trial and Conviction.*

## REMARKS.

After reading the interesting, though, at the present day, unimportant matter relating to the modes in which prisoners were formerly tried, you must pay special attention to the present mode of trial, viz.—

*Trial by jury*—in connection with which the following points are some of the most important—

- (a) The jury to try a prisoner (or *petty jury*) consist of *twelve* men, none of whom must have acted in the grand jury by which the bill was found against the prisoner.

- (b) The jury to try misdemeanors in the Queen's Bench Division may be a *special jury*.
- (c) The jury as they are sworn may be *challenged* by the prisoner as in civil actions (see Bk. V. Ch. XI.).
- (d) After the jury are sworn the counsel for the prosecution opens the indictment and calls his witnesses. The prisoner's counsel then replies, and calls his witnesses, and then makes his speech. And the counsel for the prosecution replies. The judge then sums up the case, drawing the jury's attention to the main points for them to consider.
- (e) The jury must deliver their verdict, as they cannot generally be discharged, as they may in civil actions.
- (f) The verdict may be (as in civil actions) either *general* or *special*.
- (g) A *general* verdict is either "not guilty," when the prisoner is *acquitted*, or "guilty," when the prisoner is said to be *convicted*. A *special* verdict is where the jury state what they find to be the facts, and leave the Court to pronounce judgment.
- (h) A prisoner may also be convicted by his own *confession*, if voluntarily made.
- (i) One witness is generally sufficient to convict a prisoner; but in some cases two witnesses are required—*e. g.* in treason, misprision of treason, and perjury.
- (j) The prisoner cannot give evidence—nor can her husband or his wife.
- (k) The rules as to evidence laid down in connection with civil actions apply generally to criminal proceedings also (see Bk. V. Ch. XI.).
- (l) There is no appeal or new trial (as a rule) in criminal cases.
- (m) The prosecutor and his witnesses are allowed their expenses in attending at the trial, and also certain small sums for their loss of time.
- (n) The Court can order the restitution of property stolen (even though sold in market overt) to the true owner, unless the property consist of valuable securities which have been discharged by the person liable, or, being negotiable instruments, have been *bonâ fide* taken for value by any person without notice of the fact that they had been wrongfully dealt with.

## POINTS TO NOTE.

- I. What the nature of the following species of trial respectively was—
  - (a) By ordeal (distinguishing ordeal by fire and water respectively).
  - (b) By corsned.
- II. What the proceedings in the old mode of trial by *battle* were, and when this trial was abolished.  
[N.B.—This subject should be particularly read.]
- III. Why it is that in criminal trials in the House of Lords no special verdict can be given as in trials by jury.
- IV. In what other respect trials of peers in parliament differ from trials of commoners by a jury.
- V. What the rules are as to the prisoner challenging jurors in criminal cases.
- VI. What a *peremptory* challenge is, why such challenges are allowed, and whether there is any limit to the number of them allowed.
- VII. Whether or not jurors can be punished for finding verdicts contrary to the summing-up of the judge.
- VIII. Whether after *acquittal* or after *conviction* a new trial can be had.
- IX. Whether confessions of their guilt by defendants can be used against them at the trial, and, if so, under what circumstances.
- X. Whether (a) witnesses can be called to speak to the character of the prisoner; (b) evidence of previous convictions can be given.
- XI. In what cases costs are allowed to the prisoner.
- XII. Whether stolen goods not belonging to the prosecutor, and of which the theft is proved against the prisoner, can be restored to the true owner.
- XIII. What the cases are in which a person from whom goods have been stolen may regain possession of them without an order of restitution from a Court of criminal jurisdiction.
- XIV. Whether an order for the restitution of stolen goods can be made by a justice of the peace in cases of larceny, in which he can exercise a summary jurisdiction.

## Chapter XIX.—Of Judgment and its Consequences.

## REMARKS.

After a verdict of “guilty” has been returned against the prisoner, the judgment of the Court upon him passes—*i. e.* the judge sentences or awards him such punishment as the law annexes to the particular crime; and this, as you have seen, may be penal servitude, or imprisonment, or the payment of a fine. The term of penal servitude, as you will remember, varies from life to five years, according to the nature of the offence, and the term of imprisonment can rarely exceed two years, and may be either with or without hard labour; and solitary confinement of the prisoner may be added, and in some cases the prisoner may be ordered to be whipped.

The prisoner cannot be sentenced in his absence, and if he does not appear, a *capias* to produce him must issue, and if he cannot be taken, proceedings to outlaw him proceed. Before judgment is passed the prisoner can apply to the Court *to arrest judgment* for some defect in the record, and if the defect is a substantial one the Court discharges the prisoner, who, however, can be again indicted. If, on application to arrest judgment, a question of law arises, the Court may reserve it, and have it stated in the form of a special case for the consideration of the judges, and meanwhile postpone judgment or respite the execution of it. A *pardon* may also be pleaded in arrest of judgment.

## POINTS TO NOTE.

- I. At what stage the plea of “benefit of clergy” ought to have been put in.
- II. On what this benefit of clergy appears to have been founded, and whether it extended to any persons besides the clergy.
- III. Whether judgments in criminal cases are, as judgments in civil cases, duly entered or recorded.
- IV. What the nature of punishment usually awarded for (a) misdemeanor, (b) felony, is. Suppose there is no common law or statutory rule regulating the amount of punishment for a particular offence, what sentence the Court can pass.
- V. What modes of punishment enumerated by Blackstone are not now used.
- VI. Whether either in felony or misdemeanor cumulative sentences can be awarded; if so, whether the aggregate amount of the sentences must be within the limit of punishment allowed by the law.

- VII. What circumstances the Court ought to take into consideration when awarding fines.
- VIII. Why a fine in the King's Court is called a ransom, and what proportion the fine should bear to the ransom when a statute speaks of both fine and ransom as a punishment.
- IX. What the rules as to "whipping" as a punishment for offences are, and whether they are the same when applied to summary convictions before justices of the peace as when applied to convictions at the assizes or sessions.
- X. What the punishment substituted by 1 Geo. IV. c. 57, for the whipping of females is.
- XI. A Court orders a prisoner to be whipped without stating the number of the strokes to be administered: whether such a sentence is good.
- XII. For what sentence penal servitude was substituted, and what some of the main provisions of the Penal Servitude Acts are.
- XIII. What the smallest term is for which penal servitude may be awarded.
- XIV. By whose authority a licence for a prisoner "to be at large" before the expiration of his sentence may be granted. Whether such a licence is revocable or not.
- XV. What provisions have been made for the purpose of identifying prisoners.
- XVI. What the immediate effect was which at common law followed on an *attainder*.
- XVII. How *attainder* differed from *conviction* in its nature and effect.
- XVIII. What, prior to 1870, the consequences of *attainder* were.
- XIX. Whether (a) by *attainder* of a husband his widow lost her dower; (b) by *attainder* of a wife her widower lost his curtesy.
- XX. What the difference between forfeiture for treason and forfeiture for other felonies was.
- XXI. Whether any forfeiture occurred if a man was guilty of *felo de se*.
- XXII. How forfeiture of goods and of lands differed.

- XXIII. What the provisions of 33 & 34 Vict. c. 23, as to forfeiture for conviction for offences, are.
- XXIV. When forfeiture which occurred by "flight of the felon" without conviction was abolished.
- XXV. With what solemn words the sentence of death is pronounced.

#### Chapter XX.—Of Reversal of Judgment.

##### REMARKS.

After judgment has been passed on a prisoner it may be set aside, and execution on it prevented by two ways, viz.:—By falsifying or reversing the judgment; by reprieve or pardon.

Of the former the present Chapter treats; the latter is the subject considered in the next Chapter.

Judgment may be falsified or reversed—(a) *without a writ of error*, and (b) *with a writ of error*.

- (a) *Without a writ of error*, for matters not apparent on the face of the record—*e. g.* for want of authority in the judge who tried the case,

[N.B.—A judge trying a case without authority is guilty of a high misdemeanor.]

- (b) *By a writ of error*: a judgment may be reversed for some notorious and substantial mistakes in it, or in the record; as if a man guilty of misdemeanor only be adjudged a felon. The writ lies to the Queen's Bench in cases of misdemeanor, with leave of the Attorney-General, which must be given if sufficient cause be shown to him; but, in cases of felony, the writ is a matter of favour only, and may issue either by express warrant under the sign manual, or by the Attorney-General's consent. The Court of Error can *either* quash the writ of error, and thus affirm the judgment and commit the prisoner at once if he is present, *or* reverse the judgment, when all former proceedings are deemed absolutely void, and the prisoner is in the same position as he would have been had he never been accused, but he may be indicted again.

#### Chapter XXI.—Of Reprieve and Pardon.

##### REMARKS.

A *Reprieve* is the temporary withdrawal of a sentence, whereby the execution of the sentence is suspended. It may be granted—

- (a) *Ex mandato regis*: from the pleasure of the Crown.

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- (b) Where the judges think a reprieve proper because—(i) they are dissatisfied with the verdict; (ii) the evidence was suspicious; (iii) the indictment insufficient; or (iv) favourable circumstances appeared in the prisoner's character.
- (c) *Ex necessitate legis*: as when (i) a woman prisoner sentenced to death is pregnant, her execution is respited till delivery, a jury of twelve matrons having brought in their verdict that the prisoner is quick with child; or (ii) the prisoner becomes *non compos mentis*; or (iii) there is a doubt as to the identity of the prisoner.

*Pardons.*—All offences can be pardoned by the sovereign, excepting (1) the offence of committing a man to prison out of the realm; (2) an offence for which private justice is principally concerned in the prosecution of—*e.g.* a public nuisance; (3) an impeachment. The pardon must be under the great seal, and signed by the sovereign; and if any deceit has been used to obtain it the pardon is void. It may be granted absolutely, or under a condition, on the performance of which the validity of the pardon will depend. A pardon may be also obtained by Act of Parliament, and when so obtained is more beneficial than one obtained from the sovereign, as it need not be pleaded, the Court being bound to take notice of the effect of an Act of Parliament; while, if a prisoner does not specially plead a pardon obtained from the sovereign, he waives the benefit of it.

In its effect, a pardon makes the offender a new man.

#### Chapter XXII.—Of Execution.

##### REMARKS.

This Chapter treats of the last step in criminal proceedings, viz. the execution of the judgment. It must be performed by the sheriff or his deputy. His warrant, in the case of a judgment of the Court of the Lord High Steward, is a precept signed and sealed by the judge; and in the case of a judgment of the House of Lords his warrant is a writ from the sovereign. In other cases, under the present practice, the judge signs the *calendar*—*i.e.* the list of the prisoners' names, with their separate judgments in the margin, and this is the sheriff's warrant to execute the judgment. The sheriff must not alter the *manner* of death, and if he does he commits felony. If, after hanging, the prisoner revives, he must be hanged again. The execution is now privately carried out within the prison walls, and not publicly as formerly.

**The Conclusion.****REMARKS.**

In this Chapter the author of the Commentaries marks "some outlines of English judicial history, taking a chronological view of the state of our laws, and their successive mutations at different periods of time." The Chapter is full of interest; and, though it is hardly one from which the Examiners are likely to take questions, it would, nevertheless, be far from safe on your part to omit a careful perusal of its contents. The following are points to which your particular attention is required:—

**POINTS TO NOTE.**

- I. What the six periods are under which the author of the Commentaries considers the state of our legal policy.
- II. Why it is that there is great difficulty in deriving a particular custom from any one of the several nations by whom Britain was conquered before the date of the Norman invasion and conquest.
- III. By which of our early kings the first codification of laws was made, and by whom the second codification.
- IV. Enumerate some of the most memorable of the Saxon laws.
- V. What new laws and customs were introduced by the Normans.
- VI. What the effects produced by the feudal system were, and in whose reign that system became rooted in our land.
- VII. What the four things of importance to a student of the law were which took place in Henry IV.'s reign.
- VIII. What laws introduced by the Normans were especially distasteful to the Saxon part of the nation.
- IX. What the provisions of the Magna Charta and Charta de Foresta, enacted in King John's reign, were, and what result they were calculated to effect.
- X. Show why Edward I. has been justly styled the "English Justinian."
- XI. Enumerate the principal alterations in the Constitution effected in Edward I.'s reign; what proof is there that these alterations effected improvements.
- XII. What important legal treatises were written in Edward I.'s reign.



- XIII. Why no judicial improvement was effected in Henry VII.'s reign. In what matters that king and his ministers were mainly industrious.
- XIV. What important change in the ecclesiastical part of our Constitution took place in Henry VIII.'s reign.
- XV. The same question as to our civil policy and the law of property.
- XVI. Explain how it was that the Constitution, as established by Elizabeth, was far from satisfactory.
- XVII. To what the caution, apparent in Elizabeth's conduct, may be attributed. Whether the caution was beneficial to the country or otherwise.
- XVIII. What the legal improvements (if any) effected in King James I.'s reign were.
- XIX. What the various grievances existing in Charles I.'s reign, which called for redress in a legal constitutional way, were.
- XX. How the breaking out of the Civil War in Charles's reign, the trial and murder of that king, is accounted for.
- XXI. Prove that "the Constitution of England arrived at its full vigour, and the true balance between liberty and prerogative was happily established by law, in the reign of Charles II."
- XXII. What the main improvements in the law, having in view the assertion of the liberties of the English, effected soon after the Reformation, were.
- XXIII. Show that while the Crown lost by these alterations much in prerogative, it regained as much in influence.
- XXIV. Enumerate some of the principal improvements effected since the commencement of the present century in (a) ecclesiastical matters; (b) the law of property; (c) the administration of civil justice; (d) the administration of criminal justice.

#### TEST PAPER TO WORK OUT.

1. In what cases can a husband or wife give evidence against the other of them in criminal proceedings?
2. Discuss the advantages to a prisoner of a trial by jury.
3. Can witnesses be called for the prisoner? Discuss shortly the old law on the point.
4. Enumerate the consequences of a judgment against a prisoner, first as regards his person, and secondly as regards his property.

5. Discuss the effect of a pardon "for all felonies." In what cases is it necessary that the offence be particularly specified in the pardon?

6. Can the sovereign alter the manner of execution—*e. g.* burning for hanging? Give the reason for your answer.

7. What two statutes are said to form a second Magna Charta in our Statute-book? Give reasons for your answer, and compare the effect of the two statutes you name with that of the real Magna Charta signed at Runnymede in 1215.

8. What great improvement in the administration of civil justice was effected by the Judicature Acts?

### Eighteenth Week's Work.

Analyze the following Statutes and revise Book V. (Vol. III.)

#### Volume III.

11 *Geo. 2, c. 19*—containing important provisions relating to distress, &c., &c.

9 & 10 *Vict. c. 93* (*Lord Campbell's Act, 1846*)—creating an exception to "*actio personalis moritur cum personâ*." Extended by 28 & 29 *Vict. c. 95*.

34 & 35 *Vict. c. 79* (*The Lodger's Protection Act, 1871*)—protecting a lodger's goods from distress.

36 & 37 *Vict. c. 66* (*The Judicature Act, 1873*).—Sects. 25 and 34 particularly important.

37 & 38 *Vict. c. 57* (*The Real Property Limitation Act, 1874*).

39 & 40 *Vict. c. 59* (*The Appellate Jurisdiction Act, 1876*)—restoring the jurisdiction of the House of Lords as an ultimate court of appeal, &c.

44 & 45 *Vict. c. 41* (*The Conveyancing Act, 1881*).—By this act, in addition to the powers set out *ante*, p. 100 and p. 257, the following rights are conferred:—Trustees may compromise claims and vest the property in new trustees by a mere declaratory deed, without the necessity of a transfer of the property or a vesting order from the Court. The Court may, where for the woman's benefit, and she is willing to consent, bind her interests in property settled to her separate use, even though a restraint on alienation is imposed. A married woman, even though an infant, may appoint an attorney.

## Volume IV.

24 & 25 *Vict. c. 94 (Accessories and Receivers Act)*, Chapter II.

24 & 25 *Vict. c. 96 (Larceny Act)*.—This act regulates the law of larceny, and of the offences against property, treated of in Chapter V.

24 & 25 *Vict. c. 97 (The Malicious Injuries to Property Act)*.—The provisions of this act are mainly treated of in Chapter V.

24 & 25 *Vict. c. 98 (The Forgery Act)*.—This statute makes many acts forgery which at common law did not constitute forgery. The subject is treated of in Chapter V.

24 & 25 *Vict. c. 99 (Coinage Act)*.—This statute regulates the law of counterfeiting, and uttering false coins, and is treated of in Chapter V.

24 & 25 *Vict. c. 100 (Offences against the Person Act)*.—This statute is treated of in Chapter IV.

[N.B.—These six statutes are the main statutes on criminal law, and are known as the Criminal Law Consolidation Acts, 1861.]

31 & 32 *Vict. c. 116*.—This act makes a partner guilty of larceny if he wrongfully applies the partnership property to his own purposes.

33 & 34 *Vict. c. 23 (The Felony Act, 1870)*.

33 & 34 *Vict. c. 58 (The Forgery Act, 1870)*.

1 *Geo. 1, st. 2, c. 5 (The Riot Act)*.

10 & 11 *Vict. c. 82 (The Juvenile Offenders Act)*.

11 & 12 *Vict. c. 42*.—This statute relates to justices' warrants in indictable offences.

11 & 12 *Vict. c. 43*; 18 & 19 *Vict. c. 126*, and 42 & 43 *Vict. c. 49 (The Summary Jurisdiction Acts, A. D. 1848, 1855, and 1879)*, referred to in Chapter XI.

By these acts the following important powers are conferred on Courts of summary jurisdiction:—

(a) The right to try and punish *children* (*i. e.* persons apparently under twelve) for any offence (except homicide), the punishment imposed not exceeding one month's imprisonment or a fine of 40s., with *six* strokes of the birch rod if a male offender.

(b) The right to try and punish *young people* (*i. e.* persons apparently between twelve and sixteen) for larceny, embezzlement, or for the guilty reception of stolen goods, or any attempt to commit those offences. The offender must consent to be so tried, and the punishment awarded must not exceed three months' imprisonment or 10*l.* fine, with *twelve* strokes of the birch rod if a male offender.

(c) The right to try and punish *adults* for any of the offences given in the last head, when the value of the property does not exceed 40s. The offender must consent to be so tried, and the punishment must not exceed imprisonment for three months or 20*l.* fine.

It is also provided that where a court of summary jurisdiction has authority under any other act to either imprison or fine, the imprisonment may be without hard labour, and the prescribed period thereof, or of the amount of the fine, may be reduced, and the Court may dispense with the requirements of statutes as to offenders finding sureties of the peace, &c. And if some act authorizes imprisonment only, and the Court thinks that the justice of the case would be better met by a fine, a fine not exceeding 25*l.* may be ordered.

41 & 42 *Vict. c. 73* (*The Territorial Waters Jurisdiction Act, 1878*).—This act declares that an offence committed by any person (whether a British subject or not) on the open sea, within the territorial waters of her Majesty's dominions (*i. e.* within one marine league of low water-mark), is an offence within the jurisdiction of the Court of Admiralty, although committed by a foreign ship.

#### TEST PAPER TO WORK OUT.

1. A. disseises B., and then lets the lands to B. by deed for five years. Does the doctrine of "remitter" apply here? Give your reason.

2. On what grounds can an award be set aside?

3. A. owes to B. 1,000*l.* A. pays him 100*l.*, for which B. gives a receipt in discharge of the 1,000*l.* Subsequently B. commences an action for the balance of 900*l.*, and A. in defence pleads accord and satisfaction, and produces B.'s receipt. Who will succeed in the action, A. or B., and why?

4. With what object is a concurrent writ of summons issued?

5. What is the difference between the sheriff's duties under a writ of *elegit* and a writ of *feri facias*?

6. A. is tenant for life without impeachment for waste. B. is the remainderman. What acts on the part of A. can B. obtain an injunction to restrain?

7. "Equity abates the rigour of the law." How far is this maxim true?

8. A.'s dog bites B. B. brings an action for damages for negligence. What facts must he prove?

### Nineteenth Week's Work.

Revise Volume IV. and then answer the following questions:—

1. What according to Blackstone were the evils which resulted from the frequency in the days of capital punishment for offences?
2. A. and B. are both shipwrecked, and seize on the same plank. A., finding that the plank will not support both B. and himself, thrusts B. from it. B. is drowned, but A. is saved. Is A.'s homicide justifiable, excusable or felonious?
3. In connection with crimes, what do you understand by the "benefit of clergy"? To whom did it extend?
4. What constitutes the offence of "robbery"?
5. Enumerate some acts constituting the offence of piracy.
6. What crime is it to disinter a dead body, and how punishable?
7. When is a prisoner said to "stand mute"? On his doing so, what was the former and what is the present course of proceeding?
8. What is a reprieve? how may it be granted?

### The Last Month.

During this month you will be able to go through the Commentaries with this Guide from beginning to the end, and having done so, you ought to have no difficulty when in for the Examination in answering the questions in such a way as to satisfy the Examiners of your right to their certificate that you have satisfactorily passed the Intermediate Examination.

In Appendix B., *post*, you will find some useful hints to observe when in for the Examination.

## APPENDIX A.

### TRANSLATION OF LATIN MAXIMS AND SENTENCES.

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*Absolutum et directum dominium.* The absolute and direct dominion.

*Absque generali senatûs et populi conventu et edicto.* Apart from the general meeting and decree of the senate and people.

*Aula regis.* The King's Court.

*A verbis legis non recedendum est.* There must be no departure from the words of the law.

*Auxilia fiunt de gratia et non de jure, cum dependeant ex gratia tenentium et non ad voluntatem dominorum.* Aids are rendered as of favour, and not of right, since they depend on the favour of the tenants and are not at the will of the lords.

*Ad voluntatem domini.* At the lord's will.

*Actus Dei nemini facit injuriam.* The act of God does no man any injury.

*A vinculo matrimonii.* From the bond of matrimony.

*Ad ostium ecclesiæ.* At the church door.

*Accessorium non ducit sed sequitur suum principale.* The incident does not lead, but follows its principal.

*Æquitas sequitur legem.* Equity follows the law.

*Animum revertendi.* The spirit of returning.

*Ad colligendum bona defuncti.* To collect a deceased man's property.

*Aliter quam ad virum ex causâ regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.* Otherwise than a husband is allowed by law and reason, with the view of controlling and correcting his wife.

*Augusta (or) Pïssima regina conjux divi imperatoris.* Augusta (or) most dutiful queen, wife of the emperor of blessed memory.

*Augusta legibus soluta non est.* Augusta is not free from the laws.

*Aurum reginæ.* Queen-gold.

*Ad defendendum regem.* For the protection of the king.

*Arcana imperii.* Mysteries of the crown.

*Ad hoc autem creatus est rex, ut justitiam faciat universis.* But for this end has a king been appointed, that he may administer justice to one and all.

*A societate nomen sumpserunt, reges enim tales sibi associant.* They derived their title from association, for kings associate such people to themselves.

*Advocatio—in clientelam recipere.* Advowson—to take into protection.

*Apprenticii ad legem.* Apprentices according to law.

*Accedas ad curiam.* Go to the higher Court.

*Anno 1261, justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptistæ;—et totus comitatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt.* In the year 1261, justices in eyre came to Wigornia in the octaves of St. John the Baptist;—and the whole county refused to admit them, because seven years had not yet elapsed since their last sitting in that place.

*Actiones compositiæ sunt, quibus inter se homines disceptarent: quas actiones, ne populus prout vellet institueret, certus solennesque esse voluerunt.* Actions were formed by which men might sue each other; which actions, that the people might not appoint them as they like, they wished to be fixed and regular.

*Ætas pubertati proxima.* The age nearest to puberty.

*Agentes et consentientes pari pœnd plectantur.* The acting and consenting parties shall be visited with similar punishment.

*Ab ingressu ecclesiæ.* From entering the church.

*A quâ non deliberentur sine speciali præcepto domini regis.* From which they shall not be set free without a special order from the lord the king.

*Bona dea.* Good goddess.

*Bona waviata.* Waifs.

*Cunctas nationes et urbes, populus, aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.* Every nation and city is governed either by the people, by the nobility, or by a single person; a form of government chosen from and constituted out of these is easier to be praised than effected, or, if effected, cannot by any means be of long duration.

*Contra pacem domini regis.* Against the peace of the lord king.

*Contra pacem ballivorum.* Against the peace of the bailiff.

*Contra pacem vice comitis.* Against the peace of the sheriff.

*Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit.* They till the land apart and in different directions; according as a spring, a field, or grove has been found pleasing.

*Cujus est solum, ejus est usque ad cælum (et ad inferos).* He to whom the soil belongs, to him also belongs all above it, even up to the sky (and all under it to the depths below). [This shows that the word land is *nomen generalissimum*, a most general term.]

*Cujus est divisio alterius est electio.* When one divides, the other has the right of first choice.

*Cuicunque aliquid conceditur, conceditur et id sine quo res ipsa non esse potuit.* To whomsoever anything is conceded, is conceded that also without which the thing itself could not be.

*Custos rotulorum.* Keeper of the rolls.

*Cujus regis temporibus hoc ordinatum sit non reperio.* I cannot find out in whose reign this regulation was made.

*Caveat emptor.* Let the purchaser be on his guard.

*Causa jactitationis matrimonii.* The case of a boast of matrimony.

*Contra omnes homines fidelitatem fecit.* He took an oath of allegiance against all men.

*Curia advisari vult.* The Court wishes to consider.

*Custuma antiqua sive magna.* Ancient or great customs.

*Custuma parva et nova.* Small and new customs.

*Consuetudo et lex Angliæ.* Custom and law of England.

*Cum olim in usu fuisset, alterius nomine agi non posse, sed quia hoc non minimam incommoditatem habebat, cæperunt homines per procuratores litigare.* Although it was formerly the custom, not to be able to act in another's name, yet because this entailed great inconvenience, people began to employ attorneys in their lawsuits.

*Crimen falsi.* Crime of falsification.

*Communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.* Common pleas shall not follow the King's Court, but shall be held in some certain place.

*Celeberrimo huic conventui episcopus et aldermanus intersunt: quorum alter jura divina, alter humana populum edocet.* The bishop and alderman shall be present at this meeting; one of whom shall instruct the people in divine, the other in human, law.

*Curia pedis pulverizati.* The Court of Dusty Feet.

*Cum sit contra præceptum Domini, non tentabis Dominum Deum tuum.* Since it is contrary to God's command, Thou shalt not tempt the Lord thy God.

*Cuique in proprio fundo quamlibet feram quoquo modo venari permissum.* Everyone has full liberty, in his own territory, to hunt the wild beast in what way soever.

*Cessante ratione, cessat et ipsa lex.* With the cessation of the reason, the law also ceases itself.

*Custos horrei regii.* Guard of the royal barn.

*Cum testamento annexo, et durante minore ætate.* With administration of the will, and while the minority lasts.

*Consules, a consulendo; reges enim tales sibi associant ad consulendum.* Consuls, from consulting; for the kings are wont to take such to themselves as assessors in counsel.

*De bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.* From the deceased's property must be taken first, what pertains to necessity; next, what pertains to expediency; and lastly, what pertains to will.

*De communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus.*



Concerning the general advice on certain difficult and pressing affairs relating to the king and the state of defence of England and of the English Church.

*De minoribus rebus principes consultant, de majoribus, omnes.* Upon the less important affairs the chiefs deliberate, upon those of greater importance, all.

*De sturione observetur, quod rex illum habebit integrum; de balena vero sufficit, si rex habeat caput, et regina caudam.* Be it noted that in the case of a sturgeon, the king shall have it whole; but in the case of a whale, it is enough if the king has its head, and the queen its tail.

*De prerogativa regis.* Concerning the king's prerogative.

*De idiotâ inquirendo.* Concerning inquiry about an idiot.

*Dicebatur fregisse juramentum regis juratum.* He was said to have broken the sworn oath of the sovereign.

*Divisum imperium.* A divided sway.

*Dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.* All the tithes must be paid to the principal church to which the parish belongs.

*Dent operam consules, ne quid respublica detrimenti capiat.* The consuls are to see that the state is uninjured.

*Dominicum dicitur quod quis habet ad mensam suam—dicitur etiam dominicum villenagium, quod traditur villanis.* The demesne is said to be that [land] which anyone keeps for the purposes of his family; that which is handed down to the villeins to be held in villenage is also called the demesne.

*Donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit.* The gifts shall be of strict right, that no one may be presumed to have given more than he has expressed in the gift.

*Descendit jus quasi ponderosum quid, cadens deorsum rectâ lineâ; et nunquam reascendit eâ viâ quâ descendit.* Right descends like something falling heavily downwards in a straight line; and it never goes up again by the same way as it came down.

*Dum bene se gesserit.* While he conducts himself properly.

*Damnum absque injuriâ.* Damage apart from injury.

*Delictis, pro modo pœnarum, equorum pecorumque numero convicti multantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.* People convicted of crimes are fined, by way of penalty, in a certain number of horses and cattle. Part of the fine is paid to the king or state; part to the person injured or his relations.

*De excommunicato capiendo.* A writ of excommunication.

*De contumace capiendo.* A writ for contempt.

*De jure nature, cogitare per nos atque dicere debemus; de jure populi Romani, quæ relicta sunt et tradita.* Concerning the law of nature, we ought to think and speak of ourselves; concerning the law of the Roman people, we should follow what has been bequeathed and handed down.

*De uxore raptâ et abductâ.* Concerning carrying off and abducting a wife.

*Divus Hadrianus rescripsit eum qui stuprum sibi vel suis inferentem occidit, dimittendum.* Hadrian, of blessed memory, granted an acquittal to anyone defending his own chastity, or that of his relations.

*Decemviri.* Decemvirs.

*Dedi et concessi.* I have given and granted.

*Devenio vester homo.* I become your man.

*Duplicem valorem maritaggi.* Double the value of the marriage alliance.

*Dici poterit socagium a socco, et inde tenentes socmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et maritagia ad propinquiores parentes jure sanguinis pertinebant.* Socage can be so called from *soc*, and hence the tenants [are called] socmen; for the reason that they are deputed, it seems, merely to the cultivation of the fields; and also their wardship and marriage belong to the nearer relatives by right of blood.

*Donatio stricta et coarctata; sicut certis hæredibus, quibusdam a successionem exclusis.* A strict and restrained gift; as to certain heirs, some being excluded from succession.

*Durante viduitate.* During widowhood.

*De jure communi.* Of common right.

*De minimis non curat lex.* The law does not trouble itself about very small things.

*Dehors.* Outside (beyond).

*De rationabili parte bonorum.* Concerning the reasonable division of property.

*Delegatus non potest delegare.* A deputy cannot depute.

*Donatio mortis caudâ.* A gift with respect to death.

*De ventre inspiciendo.* To examine the womb.

*Decet tamen principem servare leges, quibus ipse solutus est.* It becomes a prince, however, to keep the laws from which he himself is free.

*De coronatore eligendo.* Concerning the election of a coroner.

*De coronatore exonerando.* Concerning the exemption of a coroner.

*De probioribus et potentioribus comitatûs sui in custodes pacis.* From the most upright and influential men of their county as guardians of the peace.

*Dotalitii et trientis ex bonis mobilibus viri.* Of dower and third part of the movable goods of her husband.

*De terris acquisitis et acquirendis.* Of lands acquired and to be acquired.

*De omnibus quidem cognoscit, non tamen de omnibus judicat.* It takes cognizance indeed of all matters, it does not, however, decide on all matters.

*Eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.* If a man defames another who is guilty, it is not just and good that he should be condemned on that account; for it is right and proper that the crimes of guilty persons should be made known.

*Ea sunt animadvertenda peccata maxime, quæ difficillime præcauentur.* Those crimes are specially to be punished which it is most difficult to guard against.

*Etiam si ad illa personæ consueverint et debuerint per electionem, aut quemvis alium modum, assumi.* Although it was customary and right that the appointment should be made by election or some other method.

*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.* The twelve elder thanes shall go out, and the leader with them, and they shall swear on the sacred object that is given into their hands, that they will not accuse any innocent person, nor conceal any guilty one.

*Eliguntur in consiliis et principes qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt.* Chiefs also are chosen in the assemblies who administer justice in the cantons and towns; a hundred for each, counts from the commons, combining counsel and authority, are present.

*Ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit.* Proof is incumbent on the affirmer, not on the repudiator; since in the nature of things no proof attaches to the latter.

*Et sequitur aliquando pæna capitalis, aliquando perpetuum exilium cum omnium bonorum ademptione.* And sometimes capital punishment follows, sometimes banishment for life, together with confiscation of all property.

*Episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniat ad diminutionem membrorum vel ad mortem.* Bishops, like the rest of the barons, must be present at the trials with the barons, until it comes to a matter concerning life or limb.

*Ex post facto.* In accordance with an after decree.

*Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.* And all the earls and barons with one voice replied, that they were unwilling to change the laws of England, which, up to this time, had been in use and approved.

*Erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.* All things were common and undivided to all, as if there were one property for all.

*Ex assensu patris.* From the assent of the father.

*Et sic totum tenet, et nihil tenet, scil. totum conjunctim et nihil per se separatim.* And so he holds the whole, and yet holds nothing, i. e. the whole conjointly and nothing separately by itself.

*Ex post facto.* By something done subsequently.

*Ex speciali gratiâ, certâ scientiâ, et mero motu reginæ (aut regis).* By the special favour, sure knowledge and uninterested motive of the queen (or king).

*Edmundus autem Latusferreum, rex naturalis de stirpe regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum.* But Edmund Ironside, the natural king, descended from a royal line, begat Edward; and Edward begat Edgar, to whom the English crown rightfully belonged.

*En ventre sa mère.* In his mother's belly.

*Ex parte paternâ.* On the father's side.

*Erant in Angliâ quodammodo tot reges vel potius tyranni, quot domini castellorum.* There were in England as it were as many kings or rather despots as there were lords of castles.

*Esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa.* (That) that is the best constituted state which is made up in a moderate degree of the three classes—royalty, nobility, and commons.

*Ex donationibus, servitia militaria vel magnæ serjantiæ non continentibus, oritur nobis quoddam nomen generale, quod est socagium.* From gifts that do not comprise services of chivalry or knight-service, there arises for us a general term, which is socage.

*Est autem dominicum propriè terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum.* But the demesne is properly the land kept for supplying the lord's table, and the villenage which is handed over to the villeins for the purpose of cultivating.

*Et ideo dicuntur liberi.* And therefore they are called freemen.

*Ex provisione viri.* By the provision of her husband.

*Expressum facit cessare tacitum.* An express promise makes an implied one to cease.

*Ex nudo pacto non oritur actio.* No action arises out of a bare agreement.

*Ex donatione regis.* By the king's gift.

*Et quod non habet principium, non habet finem.* And that which has not a beginning has not an end.

*Ex quibus rex unum confirmabat.* One of whom the king confirmed in his appointment.

*Forum plebeïæ justitiæ et theatrum comitivæ potestatis.* The forum of justice for the commons and the theatre of the county jurisdiction.

*Furiosus furore solum punitur.* A madman is punished by his madness alone.

*Frater fratri sine legitimo hærede defuncto, in beneficio quod eorum patris fuit, succedat; sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit.* A brother may succeed a brother who has died without lawful heir in the benefice that belonged to their father; but if one of the brothers shall have received a feud from a lord, if he dies without a lawful heir, his brother does not succeed to the feud.

*Feudum novum*, a new feud; *feudum antiquum*, an ancient feud; *feudum strictè novum*, a feud strictly new; *feudum novum ut antiquum*, a new feud (to be held) as an ancient feud.

*Felis summâ caudâ suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudæ tritico coöperiatur.* The cat shall be hanged by the tip of its tail, the head touching the floor, and grains of wheat shall be thrown upon it, until the tip of its tail is covered with wheat.

*Fructus industriales.* Emblements.

*Filius nullius; filius populi.* No one's son; the people's son.

*Fides est obligatio conscientie unius ad intentionem alterius.* A trust is the obligation of one's conscience to carry out another's intention.

*Fidei commissum.* An entrusting to good faith.

*Frater fratri uterino non succedet in hæreditate paternâ.* A brother shall not succeed a brother of the half-blood in the father's estate.

*Fit juris et seisinæ conjunctio.* It becomes a union of right and seisin.

*Fustibus et flagellis acriter verberare uxorem.* To thrash a wife violently with rods and whips.

*Forisfacta.* Estranged.

*Hæreticus, qui de articulis fidei aliter prædicat, sentit, vel doceat, quàm docet sancta mater ecclesia.* A heretic, one who speaks, feels, or teaches, contrary to the teaching of the Holy Mother, the Church.

*Hutesium et clamor.* Hue and cry.

*Hoc quidem perquam durum est, sed ita lex scripta est.* This indeed is hard, but it is the written law.

*Habeas corpus ad subjiciendum.* You shall have the body for submission.

*Homicidium quod nullo vidente, nullo sciente, clam perpetratur.* Murder which is committed secretly, without anyone seeing it or knowing it.

*Homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu.* Common murders; committed either by chance or even voluntarily, but in some sudden heat or fever of passion.

*Habent legibus sanctum, si quis quid de republicâ a finitimis rumore aut famâ acceperit, uti ad magistratum deferat, neve cum alio communicet; quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli et de summis rebus consilium capere, cognitum est.* They enact by law that if a man hears from his neighbours anything concerning the state by rumour or report, he shall give information to the magistrate, and not communicate it to another; because it is known that rash and ignorant people are often scared by false reports and driven to crime, and to take counsel on most important measures.

*Hostis humani generis.* An enemy of the human race.

*Heredes maritentur absque disparagatione.* Heirs shall be married without disparagement.

*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.* The heir shall not purchase anew his land, as he used to do in my brother's time; but shall take it up by paying a fixed and just relief.

*Hiis testibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis.* With these witnesses, John Moore, Jacob Smith, and others called together for this matter.

*Hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus; ceteri, latrones aut prædones sunt.* Those are enemies who have publicly declared war against us or we against them; all others are either robbers or pirates.

*Hæredes successoresque sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrum, avunculi.* A man's heirs and successors are his own children, and there is no will: if there are no children, the next degree in possession, brothers, uncles, on both sides.

*Habiles ad matrimonium.* Suited for marriage.

*In personam actio est, quotiens cum aliquo agimus qui nobis vel ex contractu, vel ex delicto obligatus est.* Personal action arises when we bring an action against any one founded on contract or on tort.

*Istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet justè occidatur iste, tamen occisor peccat mortaliter propter intentionem corruptam.* If that murder be committed from envy or from delight in shedding human blood, although the man be justly slain; still the slayer is guilty of a capital crime, on account of the base design.

*Ignorantia juris, quod quisque tenetur scire, neminem excusat.* Ignorance of the law (which everyone is considered to know), excuses no one.

*In omnibus placitis de felonid solet accusatus per plegios dimitti, præterquam in placito de homicidio.* In all cases of felony the accused is wont to be let out on bail, except in the case of murder.

*Item prie la commune a nostre dit seigneur le roi, que nul pardon soit grante a nully persone, petit ne grande, q'ont este de son conseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, lesqueux sont ou serront trovez en aucun default encontre leur ligeance, et la tenure de leur dit serement; mais q'ils ne serront jammes conseillers ne officers du roi, mais en tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plect au roi, et de touz autres en temps a venir en cas semblables pur profit du roi et de roialme*

*Responsio: Le roi ent fra sa volente, come mieltz lui semblera.*

Also, the commons pray our said lord the king not to grant pardon to anyone, small or great, of those who have been of his counsel and oath (sont empeschez) in this present parliament of life or limb, fine or ransom, forfeiture of lands, houses, property or castles, which are or shall be found in any default against their allegiance and the bond of their said oath; but they shall never be councillors or officers of the king, but wholly expelled from the king's Courts and council for ever. And on this point a statute shall be made in this present parliament, if it is the pleasure of

the king and of all others in future time, in like cases, for the profit of the king's realm.

Answer:—The king's will shall be done in the matter, as to him shall seem best.

*Ite et inter vos causas vestras discutite, quia dignum non est ut nos iudicemus Deos.* Go and argue your cases amongst yourselves, for it is not right that we should judge Gods.

*In curid domini regis ipse in propriis jura decernit.* In the Court of the sovereign king he himself decides the law in his own Court.

*Interest reipublicæ, ut sit finis litium.* It is to the interest of the state that there should be a limit to lawsuits.

*In misericordiâ domini regis pro falso clamore suo.* At the mercy of the lord the king for his false claim.

*Immoderate suo jure utatur,—tunc reus homicidii sit.* If he use his authority in an intemperate manner,—then he shall be tried for murder.

*Ibi esse pœnam, ubi et noxa est.* That the punishments should be lodged where the guilt also is.

*In futuro.* In the future.

*Id certum est quod certum reddi potest.* That is certain which is capable of being made certain.

*In perpetuum rei testimonium.* For a lasting witness of the fact.

*In pari materiâ.* Of like material.

*Incertam et caducam hereditatem relevant.* They take up again a doubtful and lapsed inheritance.

*Id tenementum dici potest sacagium.* That tenement can be called socage.

*Illud dici poterit feodum militare.* That feud can be called military.

*Ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sud.* They shall marry so as not to be disparaged, and by the counsel of their relations on the subject of their kinship.

*Instar omnium.* Like all.

*In invitum.* Unwillingly.

*In alieno solo.* In another soil.

*Idiota a casu et infirmitate.* An idiot by reason of misfortune and weakness.

*Isti vero viri eligebantur per commune consilium, pro communi utilitate regni, per provincias et patrias universas et per singulos comitatus, in pleno folk mote, sicut et vicecomites, provinciarum et comitatum, eligi debent.* But those men were elected by common consent for the general advantage of the realm throughout whole districts and counties, and in each separate county in full assembly, just as the sheriffs also of provinces and counties should be elected.

*In iudicio non creditur nisi juratis.* In a trial only sworn witnesses are believed.

*Ignoscitur ei qui sanguinem suum qualiter redemptum voluit.* A man is pardoned who wishes his own blood to be bought off in any way whatever.

*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto framedque juvenem ornant. Hæc apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur; mox reipublicæ.* In the assembly itself either one of the chiefs, or the father or a relative adorns the youth with a shield and javelin. This is the *toga* amongst them, this the first dignity of youth: before this they seem but a part of the household; soon they are a part of the state.

*In perpetuum.* For ever.

*In Britannid tertia pars bonorum descendendum ab intestato in opus ecclesiæ et pauperum dispensanda est.* In Britain, a third part of property left by an intestate person must be laid out in the service of the church and poor.

*In pari delicto, potior est conditio possidentis.* In the case of equal guilt, the condition of the possessor is the better.

*In omnibus imperatoris excipitur fortuna; cui ipsas leges Deus subjecit.* In all things the emperor's state is excepted; for to him God has put in subjection even the laws themselves.

*In naufragorum miserid et calamitate, tanquam vultures ad prædam currere.* To run to the spoil, in the wretchedness and distress of the shipwrecked, like vultures.

*Ipsius patris bene placito.* With his own father's full consent.

*Jus prosequendi in judicio quod alicui debetur.* The right of demanding in Court what is due to anyone.

*Judicium ferri, aquæ, et ignis.* The judgment of iron, water and fire.

*Jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? Quæ quidem pleraque jure prætorio liberantur, nonnulla legibus.* Who fails to see that those promises should not be kept, which have been made by intimidation or deceit? Now most of these are freed by the discretion of the prætor, some by the standing laws.

*Jus civile est quod quisque sibi populus constituit.* Civil law is that which each nation appoints for itself.

*Jus accrescendi.* The right of survivorship.

*Jura summi imperiî.* Laws of the highest authority.

*Jura regalia.* Royal rights.

*Jus accrescendi præfertur oneribus et ultimæ voluntati.* The right of survivorship is preferred to the burdens (debts) and to the last will (of a deceased tenant)

*Judex de eâ re cognoscet.* The judge shall investigate that matter.

*Juris positivi. Juris naturalis aut divini.* Conventional right. Natural or divine right.

*Jus coronæ.* The right of the Crown.



*Jus commune et quasi gentium.* General and as it were international law.

*Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* The precepts of the law are these—to live honorably, to hurt nobody, to render to everyone his due.

*Je riens ne celerai, ne souffrai estre celé ne murdré.* I will conceal nothing, nor suffer anything to be concealed or kept back.

*Levant et couchant. Levantes et cubantes.* Getting up and lying down.

*Licet meretrix fuerit antea, certe tunc meretrix non fuit, cum reclamando nequitie ejus consentire noluit.* Though she may have been a harlot in former time, at any rate she was not one at the time when, by raising an outcry, she was unwilling to consent to his iniquity.

*Luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus.* Murder is atoned for by a certain number of herds and cattle; and the whole family receives satisfaction.

*Laicos privilegio universitatis gaudentes.* Laymen rejoicing in the privilege of corporation.

*Le subpoena ne serroit my cy soventement use come il est ore, si nous attendomus tiels actions sur les cases et mainteinomus le jurisdiction de ceo court et d'auter courts.* The subpoena would not be so often used as it is now if we awaited such actions on the case and upheld the jurisdiction of this Court and of other Courts.

*Lex non exacte definit, sed arbitrio boni viri permittit.* The law does not define exactly, but leaves it to the judgment of a good man.

*Licebat palam excipere, et semper ex probabili causâ tres repudiari; etiam plures ex causâ prægnanti et manifestâ.* Open challenge was allowed; and three might always be rejected on a probable plea of suspicion; and even more in a case of overwhelming proof.

*Licet apud consilium accusare quoque, et discrimen capitis intendere.* It is lawful to prosecute also in the Council and to try capital crimes.

*Latroni eum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere.* Considered as equivalent to a robber, one who wished to conceal a theft and to allow his compounding secretly without a judge.

*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contemento suo; et mercator eodem modo, salvo mercandisâ suâ; et villanus eodem modo amercietur, salvo wainagio suo.* A free man shall not be fined for a small offence, except in accordance with the measure of the offence itself; or for a great offence, according to the greatness thereof, a landowner keeping his land, and a merchant in the same way keeping his merchandise; and let a countryman be similarly fined, keeping his wainage.

*Les juges sont sages personnes et autentiques,—sicomme les archevesques, evesques, les chanoines des eglises cathedraulx, et les aultres personnes qui ont dignitez en sainte eglise; les abbez, les prieurs conventuaulx, et les gouverneurs des eglises, &c.* Judges are wise and authentic persons—as

archbishops, bishops, canons of cathedral churches, and other dignitaries of the holy church; abbots, conventual priors, and governors of churches.

*Leges sub graviore lege.* Laws under a more important law.

*Leges posteriores priores abrogant.* Subsequent laws repeal former laws.

*Lex et consuetudo parliamenti; ab omnibus quærenda, a multis ignorata, a paucis cognita.* The law and custom of parliament, which should be inquired into by all, is unknown to many and known to few.

*Lex parliamenti est a multis ignorata.* The law of parliament is unknown by many.

*Leges solâ memoriâ et usu retinebant.* Laws were only binding by memory and usage.

*Legum Anglicanarum conditor.* The builder (maker) of the English laws. This was said of Alfred the Great, while Edward the Confessor was called the *restitutor legum*, or restorer of our laws.

*Legibus patriæ optime instituti.* Best versed in the country's laws.

*Levandæ navis causâ.* To lighten the ship.

*Le roy (or la reine) s'avisera.* The king (or queen) will consider the matter.

*Le roy (or la reine) remercie ses loyals subjects, accepte leur benevolence, et aussi le veut.* The king (or queen) thanks his loyal subjects, accepts their goodwill, and wills it also.

*Les prelates, seigneurs, et commons, en ce present parliament assemblés au nom de tous vous autres subjects, remercient très humblement votre Majesté, et prient à Dieu vous donner en santé bone vie et longue.* The prelates, lords and commons, now assembled in this present parliament in the name of all your other subjects, most humbly thank your Majesty, and pray God to give you a good and long life of health.

*La ley est le plus haute inhéritance que le roy ad; car par la ley il même et tous ses sujets sont rûlés, et si la ley ne fuit, nul roy, et nul inhéritance sera.* The law is the highest heritage that the king has; for by the law he himself and all his subjects are governed, and if the law did not exist there would be neither king nor inheritance.

*Molliter manus imposuit.* He laid hands on him gently.

*Mala praxis.* Bad action.

*Malitia supplet ætatem.* Knavery makes up for age.

*Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tiel case perdra la feme la une meyn per jugement, come le membre dount ele avera trespassé.* But if the complaint be made of a woman, that she has maimed anyone's limbs, in such a case the woman shall lose a hand by judgment (of the Court), as the member by which she had trespassed.

*Malam cerevisiam faciens, in cathedrâ ponebatur stercoris.* Anyone guilty of adulteration was placed on a seat of dung.

*Malus usus abolendus est.* A bad custom must be abolished.

*Modus legem dat donationi.* The measure gives the law to the gift.

*Mala grammatica non vitiat chartam.* Bad grammar does not vitiate a deed.

*Mansueta, quasi manui assueta.* Tame, as it were accustomed to the hand.

*Magis fit de gratiâ quam de jure.* It is done rather out of favour than of right.

*Mala prohibita.* Prohibited wrongs, *i. e.* things wrong because forbidden by the law.

*Mala in se.* Things wrong in themselves, *i. e.* morally wrong.

*Mittere in confusum cum sororibus quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* To put into hotchpot with her sisters as much as her father or brother gave her when she went to her husband.

*Majora regalia imperii præ-eminentiam spectant; minora vero ad commodum pecuniarum immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent.* The greater royal prerogatives have regard to pre-eminence; but the lesser belong immediately to affluence; and these are properly the prerogatives of the purse, and belong to the treasury law.

*Mentis nostræ justa contestatio, in id solemniter jacta, ut post mortem nostram valeat.* The legal evidence of our intention, solemnly set forth in it, in order that it may be valid after our death.

*Nam omne crimen ebrietas et incendit et detegit.* For intoxication influences and discloses every crime.

*Nocturna diruptio alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve civitatis, aut burgi, ad feloniam aliquam perpetrandam.* A breaking by night into a person's house or a church, or even into the walls or gates of a state or town, for the purpose of committing some felony.

*Nemo tenetur prodere seipsum.* No one is bound to betray himself.

*Non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio, aliquid lucri sacerdotibus obveniebat.* They were not without a reward for their work and pains, for invariably from a judgment of this kind some gain accrued to the priests.

*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ.* No free-man shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed or exiled, or otherwise destroyed; nor will we pass upon him or send upon him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or delay to any man, justice or right.

*Nam silent leges inter arma.* For laws are silent during wars.

*Non potest rex gratiam facere cum injuriâ et damno aliorum.* The king cannot grant a favour to the injury and loss of others.

*Nullum tempus occurrit regi.* No time is binding on the king.

*Nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio.* Nothing was more sacred, nothing more ancient; just as if there were a hidden religion in this very number.

*Nullam veritatem celabo, nec celari permittam, nec murdrari.* I will not hide anything of the truth, nor will I allow it to be hidden or kept back.

*Nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum, vel per legem terræ.* No free man shall be taken, or imprisoned, or exiled, or in any other manner destroyed, except by lawful judgment of his peers, or by the law of the land.

*Nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui; sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet.* Nor, indeed, does it escape me, how hard it is that the crimes of fathers should be atoned for by the punishments of the sons; but this provision was wisely made by law, that the affection for their children might make their parents more friendly to the state.

*Nullus clericus nisi causidicus.* There was no clerk who was not also a pleader (in a court of law).

*Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.* No scutage can be imposed in our realm except by the common council of our realm.

*Nomen hæredis in primâ investiturâ expressum tantum ad descendentes ex corpore primi vasalli extenditur, et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant.* The name of the heir expressed in the first investiture only extends to those who are descended from the body of the first vassal, and not to the collateral descendants, unless they are descended from the body of the first vassal or of the stock.

*Nemo est hæres viventis.* No one is heir of a living person.

*Nam feudum sine investiturâ nullo modo constitui potuit.* For a feud can in no way be appointed without investiture.

*Nisi convenissent in manum viri.* Unless they had come under the power of a husband.

*Nunquam custodia alicujus de jure alicui remanet de quo habeatur suspicio quod possit vel velit aliquod jus in ipsa hæreditate clamare.* The guardianship of a person does not by right remain to any one to whom suspicion attaches either of being able or of wishing to claim any right to the inheritance itself.

*Nuper de facto, et non de jure, reges Angliæ.* Lately kings of England in fact, but not in right.

*Non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum.* Not the suspicion of a foolish and timid man, but such as can light on a firm man; for such ought the fear to be that contains in it the risk of life or bodily torture.

*Nullus liber homo aliquo modo destruatur, nisi per legale iudicium parium suorum aut per legem terræ.* No free man is to be destroyed in any way, excepting by the lawful judgment of his peers or the law of the land.

*Ne exeat regno.* Let him not go out of the kingdom.

*Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.* For we get possession bodily and mentally; and not with the body alone, nor with the mind alone. But it must not be supposed, that anyone who wishes to take possession of an estate, must walk round all the fields; but it is sufficient that he enter upon some part of his estate.

*Nemo potest esse agens et patiens.* Nobody can be both the active and the passive party (grantor and grantee).

*Nec regibus infinita aut libera potestas.* Neither have kings unlimited or free power.

*Neque enim sexum in imperiis discernunt.* For neither do they make any distinction of sex in the Crown.

*Nemo potest exuere patriam.* No one can put away his country.

*Non in regno Angliæ provideatur vel sit aliqua securitas major seu solennior per quam aliquis vel aliqua statum certiores habere possit, vel ad statum suum verificandum aliquod solennius testimonium producere, quam finem in curiâ domini regis levatum; qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet; et hæc de causâ providebatur.* In the realm of England there shall not be provided nor shall there exist any greater or more solemn safety by which any man or woman can have a more sure position or produce any more solemn evidence than the end pronounced in the court of the lord king; and this end is so called because it ought to be the final completion of all decrees, and for this reason it was provided.

*Nihil enim aliud potest rex, nisi id solum quod de jure potest.* For a king has no other power but that alone which is allowed by right.

*Nulli vendemus, nulli negabimus, aut differemus, rectum vel justitiam.* We will not sell, refuse, or postpone right or justice to anyone.

*Non obstante aliquo statuto in contrarium.* No statute to the contrary standing in the way.

*Nihil clamare poterit nisi nomine ecclesiæ suæ, quia ecclesiis parochialibus non fit donatio personæ sed ecclesiæ.* He can claim nothing, except in the name of his church, because in parochial churches the gift is not made to the parson but to the church.

*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Angliâ firmari solitam, in cæram impressam mutant, modumque scribendi Anglicum rejiciunt.* The Normans introduce waxen seals in place of the making of deeds with golden crosses and other sacred signs, as was the custom to confirm them with in England, and they reject the English method of writing.

*Novis injuriis emersis, nova constituere remedia.* New evils arising, to determine new remedies.

*Obtinuit quievisse omnia inferiora judicia, dicente jure rege.* The rule was, that all the inferior Courts were quiet whilst the king administered justice.

*Omnia gravissima censetur vis facta incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores (et vice versâ), servis in dominos, aut etiam ab homine in semet-ipsum.* Most severely of all is censured violence done by citizens to their country, by subjects to their king, by children to their parents, by husbands to their wives (or vice versâ), by servants to their masters, or even by man to himself.

*Omnes prædia tenentes quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.* All holding lands, as many soever as were of better note throughout the whole of England, became his men, and all subjected themselves to him, and were made his vassals, and swore fealty to him, that they would be faithful to him against all others.

*Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine.* All the terms which are called technical terms, and which the English use at the present time in Court, are of French extraction, and have no connection with the Saxon language.

*Omnes res suas liberas et quietas haberet.* Should have all his property freely and peacefully.

*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.* All counts, and barons, and soldiers, and serving men, and free men, one and all, of the whole of our realm aforesaid, shall have and hold themselves always well under arms and on horseback, as is becoming and right, and shall always be willing and well prepared to fulfil and carry out their entire service for us when need shall arise; according to what they owe to us from their lands and holdings to do of right, and as we have ordained to them by the general council of our whole kingdom aforesaid.

*Omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem.* Every testament is perfected by death, and the will of a testator is "ambulatory" even unto death.

*Omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis.* All goods and chattels shall be at the deceased's disposal, provided that his own wife and children have their reasonable shares secured.

*Omni ratihabitio retrotrahitur, et mandato equiparatur.* Every ratification is retrospective, and is equivalent to a contract.

*Omni quoque corporali cruciatus semoto.* All bodily torture also being removed.

*Omni privilegio clericali nudati, et coërcioni fori secularis addicti.* To be divested of every clerical privilege and assigned to the punishment of the secular court.

*Per my et per tout.* By part and by the whole.

*Pater aut mater defuncti, filio non filiæ hæreditatem relinquent. Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat.* The father or mother on their decease shall leave the inheritance to the son, not to the daughter. When a man on his decease shall not have left sons but daughters, the whole inheritance shall belong to the latter.

*Præscriptio est titulus ex usu et tempore, substantiam capiens ab autoritate legis.* Prescription is a title arising from usage and time (immemorial), taking substance from the authority of the law.

*Partus sequitur ventrem.* The offspring follows the womb.

*Pari passu.* In equal grade (equally).

*Pro dignitate regali.* In accordance with royal dignity.

*Prout eis visum fuerit ad honorem coronæ et utilitatem regni.* According as they thought fit with a view to the honour of the crown and the advantage of the realm.

*Parochia est locus in quo degit populus alicujus ecclesiæ.* A parish is a place in which the people of any church live.

*Præteritorum memoria eventorum.* Record of past events.

*Pater cunctos filios adultos a se pellebat, præter unum, quem hæredem sui juris relinquebat.* The father sent away all his grown-up sons from him save one, whom he left as heir in his own right.

*Pars illa communis accrescit superstilibus, de personâ in personam, usque ad ultimam superstitem.* That common share increases for the survivors, from person to person, up to the last survivor.

*Progressum est ut ad filios deveniret, in quem scilicet dominus vellet beneficium confirmare.* Progress was made to reach the sons, i.e. the one on whom the lord wished to settle the benefice.

*Per stirpes et non per capita.* By stock and not by head. [A maxim applying when property descends to children in the right of their parent deceased.]

*Principes regionum, atque pagorum, inter suos jus dicunt controversiasque minuunt.* The chiefs of districts and cantons administer justice among their own people and settle disputes.

*Pro salute animæ.* For the wellbeing of the soul.

*Pars mulctæ regi, vel civitati, pars ipsi, qui vindicatur, vel propinquis ejus, exsolvitur.* Part of the fine is paid to the king or state, part to the person himself who is injured, or to his relations.

*Per vinum delapsis capitalis pœna remittitur.* Capital punishment is remitted in the case of those who fall by wine.

*Proculdubio quod alterum libertas, alterum necessitas, impelleret.* Because freedom urged on the one, and necessity the other.

*Per laudamentum sive iudicium parium suorum.* By the award or the judgment of his peers.

*Peccatum illud horribile, inter Christianos non nominandum.* That awful sin, not to be mentioned among Christians.

*Placita de debitis, quæ fide interposita debentur vel absque interpositione fidei, sint in justitia regis.* Judgment on debts incurred under a pledge of faith, or apart from such pledge, shall be given in the King's Court.

*Probus et legalis homo.* An upright and just man.

*Præpositus ad quartam circiter septimanam frequentem populi concionem celebrato; cuique jus dicito; litesque singulas dirimito.* The sheriff shall hold a full assembly of the people about the fourth week, and shall administer justice to all; and shall settle individual lawsuits.

*Propter honoris respectum; propter defectum; propter affectum; propter delictum.* On account of respect of rank; on account of defect (of birth); on account of partiality; on account of misdemeanor.

*Prope soli barbarorum, singulis uxoribus contenti sunt.* They are almost the only native tribe that are satisfied with one wife apiece.

*Perjuriæ pœna divina exitium, humana dedecus.* God's punishment for perjury is destruction,—man's is disgrace.

*Per bucellam deglutiendam abjuravit.* He abjured by the corsned that had to be swallowed.

*Peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum.* Offences should bind the perpetrators of the offences, and the fear should not proceed further than the source of the crime.

*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant, nobis et concilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.* For the reason that the laws which the Irish use are repugnant to God and dissonant to all natural justice, moreover, because they ought not to be counted as laws, it seems sufficiently expedient to me and my council to grant that the English laws should be used by them.

*Possessio fratris facit sororem esse hæredem.* The possession of the brother makes the sister heiress. [A maxim applicable under the old law of descent when the half-blood were excluded from the inheritance.]

*Propter defectum sanguinis.* On account of defect of blood.

*Propter delictum tenentis.* On account of the wrong of the tenant.

*Pater familias, ob alterius culpam tenetur, sive servi, sive liberi.* The father of the household is liable for the fault of another, whether bond or free.

*Patria potestas in pietate debet, non in atrocitate, consistere.* A father's power should be based on affection, not on cruelty.

*Pecus, vagans, quod nullus petit, sequitur, vel advocat.* Cattle, vagrant, sought, followed and claimed by no one.

*Primum coram comitibus et viatoribus obviis, deinde in proxima villâ vel pago, postremo coram ecclesiâ vel iudicio.* First in the presence of comrades and travellers met with, then in the nearest hamlet or village, lastly before a church or court of justice.



*Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augetur.* The price falls and rises according to time, prospects and advantage.

*Plenam potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis seu ipsius occasione, ceterisque causis quibuscunque, summarie et de plano, sine strepitu et figura judicii solâ facti veritate inspectâ.* We give and entrust full power and authority for investigation and procedure in each and every case and transaction concerning the charge of high treason or its occasion, and all other cases whatsoever, summarily and off-hand, without the disturbance and form of a trial, on inquiry into the mere truth of the action.

*Per sceptrum.* By sceptre.

*Per annulum et baculum.* By ring and crosier.

*Prædium domini regis est directum dominium, cujus nullus est author nisi Deus.* The land of the lord the king is immediate ownership, and he holds it of no one—except it be God.

*Propria manu, pro ignorantia litterarum, signum sanctæ crucis expressi et subscripsi.* With my own hand, on account of my ignorance of letters, I have made and subscribed the sign of the holy cross.

*Qui facit per alium, facit per se.* He who acts by another acts by himself.

*Quod habeant et teneant gildam suam et omnes libertates et consuetudines.* They shall have and hold a guild of their own and all liberties and customs.

*Qui in alienum fundum ingreditur, potest a domino, si is provideret, prohiberi ne ingrediatur.* He who would enter another man's estate may be prevented from entering by the owner, if he can anticipate the entry.

*Qui tam pro domino rege quam pro se ipso sequitur.* Who prosecutes as much for his lord the king as for himself.

*Quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur, arces et aula regis, denique locus quilibet præsentem aut adventantem rege.* To which greater respect and safety are due, as temples and law courts, which were held sacred; citadels and the king's court—in short, any place where the king is present or comes.

*Qui vi rapuit, fur improbius esse videtur.* He who plunders with violence is thought to be the more atrocious thief.

*Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?* For what is more sacred, or more defended by all sanctity, than each individual citizen's house?

*Qui statuit aliquid, parte inaudita alterâ, æquum licet statuerit, hæc æquus fuit.* He who decrees anything without hearing the other side, though his decree is just, does not act justly.

*Quod prægnantis mulieris damnata pœna differatur, quoad pariat.* That the punishment of a condemned woman, great with child, shall be postponed till she be delivered of the child.

*Quod fieri facias de bonis.* That you cause to be made of the property.

*Quod manus domini regis amoveantur, et possessio restituetur petenti, salvo jure domini regis.* That the hands of the lord the king shall be removed, and the property restored to the owner, the right of the lord the king being unimpaired.

*Qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt.* Those who, being unable to defend themselves in any other way, shall have given a deadly blow, shall be innocent.

*Quand un seigneur de parlement serra arrein de treason ou felony, le roy par ses lettres patens fera un grand et sage seigneur d'estre le grand seneschal d'Angleterre; qui doit faire un precept, pur faire venir xx seigneurs, ou xviii.* When a lord of parliament shall be indicted for treason or felony, the king by his letters patent shall make a great and wise lord become the grand seneschal of England, who must issue an order for twenty or eighteen lords.

*Qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur.* Those who unlawfully unite to interfere in another's lawsuit, that they may share between them whatever is derived from the sentence on his property, by the Julian law are guilty of private violence.

*Qui ex damnato coitu nascuntur, inter liberos non computantur.* Those who are born in unlawful wedlock are not reckoned as children.

*Quod nullius est, id ratione naturali occupanti conceditur.* That which is nobody's is by natural reason conceded to the occupier.

*Quod ordinarii, hujusmodi bona nomine ecclesie occupantes, nullam vel saltem indebitam faciunt distributionem.* Because "ordinaries" holding property of this kind in the name of the church make no distribution, or, at any rate, an undue one.

*Quia habet ordinariam jurisdictionem, in jure proprio, et non per deputationem.* Because he has ordinary jurisdiction in his own right, and not by deputed authority.

*Quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.* That he cause such a man to be elected as has the knowledge, will and power to perform those duties well.

*Qui illi de temporalibus, episcopo de spiritualibus debeat respondere.* Who should be responsible to him in temporal matters and to the king in spiritual.

*Quod dotat eam de tali manerio cum pertinentiis.* That he endows her of such a manor with its appurtenances.

— *quinetiam lex,*  
*Pœnaque lata, malo quæ nollet carmine quenquam*  
*Describi:—vertere modum formidine fustis.*

And so a law was passed, and punishment imposed, forbidding anyone to be described by malicious verses; and thus they were obliged to change their note through dread of death by cudgelling.

*Quantum inde regi dare valeat per annum, salvo sustentatione sua, et uxoris, et liberorum suorum.* How much he could give the king yearly

from that source, keeping sustenance for himself and his wife and children.

*Qui non habet in crumend, luat in corpore.* He who has nothing in his pocket, must make atonement in his person.

*Quod naturalis ratio inter homines constituit, vocatur jus gentium.* That which natural reason has appointed among men is called the law of nations.

*Quod populus postremum jussit, id jus ratum esto.* That which the people has last ordained shall be law.

*Quæ ipso usu consumuntur.* Things which by their very use are consumed.

*Qui prior est tempore potior est jure.* He who is first in time has the better right.

*Qui hæret in literâ, hæret in cortice.* He who sticks to the letter, sticks to the rind.

*Qui facit per alium, facit per se.* He who acts by another acts by himself.

*Quam legem exteri nobis posuere, eandem illis ponemus.* The same law that foreigners have imposed on us will we impose upon them.

*Quod enim jus habet fiscus in aliend calamitate, ut de re tam luctuosâ compendium sectetur?* For what right has the treasury, in the case of another's disaster, to make gain of such a sad affair?

*Quum bellum civitas aut illatum defendit, aut infert, magistratus qui ei bello præsint, deliguntur.* When a state carries on a defensive or offensive war, officers are chosen to conduct it.

*Quod habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere.* That they hold and keep themselves always under arms and on horseback as is proper and right, and that they be ever ready and prepared to fulfil and carry out their service perfectly, as occasion requires, according to what they are bound by law to do for us by reason of their lands and holdings.

*Quædam præstatio loco relevii in recognitionem domini.* A kind of warranty instead of a relief as an acknowledgment of the lord.

*Quæ enim res in tempestate levandæ navis causa ejiciuntur, hæ dominorum permanent.* *Quia palam est, eas non eo animo ejici quod quis eas habere nolit.* For the things that are thrown overboard to lighten the ship remain the property of the owners. Because it is clear that they are not thrown overboard because one does not wish to have them.

*Quicquid plantatur solo, solo cedit.* Whatever is annexed to the land, is ceded to the land.

*Qui cadere possit in virum constantem, non timidum et meticulosum.* [A fear] which could light upon a firm man, not upon a timid and fearsome one.

*Rex tenuit magnum concilium et graves sermones habuit cum suis proceribus de hac terrâ; quo modo incoletetur, et a quibus hominibus.* The king held a great council, and had serious discourse with his nobles concerning this country; in what manner it was inhabited and by what men.

*Regni Angliæ; quod nobis jure competit hereditario.* Of the kingdom of England; which belongs to us by hereditary right.

*Reges ex nobilitate, duces ex virtute sumunt.* They take kings by virtue of noble birth, and dukes by virtue of merit.

*Regalem potestatem in omnibus.* Kingly power in all things.

*Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones und voce responderunt, quod nolunt leges Angliæ mutare quæ huc usque usitatæ sunt et approbatæ.* All the lord bishops asked for an agreement that children born before marriage should be legitimate, just like those born after marriage, because the Church holds such as legitimate. And all the barons and earls with one voice replied that they were unwilling to change the laws of England which, up to this time, had been in use and approved.

*Rex debet esse sub lege, quia lex facit regem.* The king should be under the law, for the law makes the king.

*Rex est vicarius et minister Dei, in terrâ: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo.* The king is the vice-gerent and servant of God on earth; everyone is under him, and he himself under no one, save only God.

*Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.* The king asserted that he himself had all the freedom in his kingdom that an emperor claimed in his empire.

*Remissum magis specie, quam re; quia cum venditor pendere juberetur, in partem pretii emptoribus accrescebat.* Remitted rather in appearance than reality; because, since the seller was ordered to pay, the price was raised to the buyer.

*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.* If anything is owed to a corporation, the debt does not bind the individual members; nor are the individuals liable for a corporation debt.

*Si universitas ad unum redit, stet nomen universitatis.* If a corporation is reduced to one, let the title "corporation" remain.

*Sic utere tuo, ut alienum non lædas.* Enjoy your own property in such a way as not to injure another man's.

*Sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt, ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodatur.* There are laws and forms appointed for all cases, so that no one may go wrong either as to the kind of injury or the method of action. For public forms, suited to private actions, are set forth by the prætor, according to the loss, grief, inconvenience, distress, and injury of each.

*Si domino deservire noluerit; si per annum et diem cessaverit in petendâ investiturâ; si dominum ejuraverit—i. e. negaverit se a domino feudum habere; si a domino, in jus eum vocante, ter citatus non comparuerit.* If he be unwilling to serve his lord; if he cease for a year and a day in seeking investiture; if he ignore his lord; if he fail to appear after three summonses by his lord.

*Suum cuique incommodum ferendum est potius quam de alterius commodis detrahendum.* Each one must bear his own inconvenience rather than diminish the convenience of another.

*Si dominus commiserit feloniam, per quam vasallus amitterit feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet.* If a lord has committed felony, which, if committed by a vassal, would lose him his feud, the lord also ought to lose the ownership of the feud.

*Si dominum cucurbitaverit—i. e. cum ejus uxore concubuerit.* If he has played his lord false—i. e. has lain with his wife.

*Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regie potestatis beneficio.* It should be known, however, that in this case the accused is not wont to be let out on bail, except by the kindness of the royal power.

*Si rector petat versus parochianos oblationes et decimas debitas et consuetas.* If the rector petition against the parishioners for due and customary offerings and tithes.

*Sacerdotes a regibus honorandi sunt, non judicandi.* The priests are to be honoured by kings and not judged.

*Si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.* If your stallion puts my mare in foal, the offspring is not yours, but mine.

*Si enim ipsi raptores metu, vel atrocitate pænæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere.* For if the ravishers themselves shall abstain through fear or severity of punishment from a crime of this kind, no opportunity will be left to a woman, whether willing or not, for sinning, because this very "willingness" of women is drawn on by the snares of a most infamous man, who intends rape. For, unless he enticed her and wheedled her by hateful artifices, he would not make her willing to give herself up to so great a disgrace.

*Sive volentibus, sive nolentibus mulieribus tale facinus fuerit perpetratum.* Whether such a crime shall have been committed with or against the wishes of the women.

*Si quis impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.* If anyone, through impatience of grief, or weariness of life, or disease, or madness, or shame, prefer to die, he shall not be punished.

*Secundum legem et consuetudinem Angliæ.* According to the law and custom of England.

*Si quis alteri ministrantium accusetur et amicis destitutus sit cum sacramentales non habeat, vadat ad iudicium quod Anglicè dicitur "coursned," et fiat sicut Deus velit, nisi super sanctam corpus Domini permittatur ut se purget.* If a man is accused to either of the ministers, and is destitute of friends, since he has not the sacramental tokens, let him have recourse to the judgment called in English "coursned," and let God's will be done, if he is not allowed to clear himself on the holy body of the Lord.

*Spoliatus debet, ante omnia, restitui.* Spoil ought, before all things, to be restored.

*Sive sit masculus sive fœmina.* Whether man or woman.

*Secundùm formam in cartâ doni expressam.* According to the form expressed in the deed of gift.

*Si uxor possit dotem promereri, et virum sustinere.* If the wife can earn a dower and support a husband.

*Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit; si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* If a dead man shall have left a wife, without children, she will have her dower; if, indeed, the wife shall have been left with children, she will certainly have her dower, so long as she shall have kept chaste and a widow.

*Seisina facit stipitem.* Seisin makes the root or stock of descent. [This was the old rule, and no man could be such an ancestor as to have descent traced from him unless he had been in actual possession of the land, or in receipt of the rents and profits before his death. The maxim has now no application, as descent is traced under the Inheritance Act, 1833, from the last purchaser, whether he has actually obtained possession or not.]

*Si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.* If there are more debts or more legacies than the deceased's property can satisfy, all the legatees shall refund a rateable proportion, the crown's privilege alone being exempt.

*Servitia servientium et stipendia famulorum.* Servants' wages and attendants' pay.

*Servi aut fiunt aut nascuntur; fiunt jure gentium aut jure civili: nascuntur ex ancillis nostris.* Men are either made or born slaves; they are made by international or civil law; they are born from our female servants.

*Sulla—tribunis plebis suâ lege injuriæ faciendæ potestatem ademit, auxilia ferendi reliquit.* Sulla, by his law, took away from the tribunes of the people the power of doing wrong, and left them the power of bringing aid.

*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.* If you have regard to antiquity, it is most ancient; if to honour, it is most honoured; if to authority, it is most authoritative.

*Secundùm subjectam materiam.* According to the subject matter.

*Sacramentum domini regis fregisse.* To have broken the oath of his lord the king.

*Scandalum magnatum.* Scandal of peers.

*Symbolum animæ.* Soul-scot.

*Senatus consultum ultimæ necessitatis.* The decree of the senate in the last extremity.

*Statuimus, ut omnes liberi homines fœdere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.* We decree that all free men should ratify, by agreement and oath, that within and without the whole realm of England they will be faithful to King William their lord; that they will everywhere preserve his lands and titles with all loyalty together with him, and will protect him against enemies and foreigners.

*Successionis feudi talis est natura quod ascendentes non succedunt.* The nature of the inheritance of a feud is such that ancestors do not inherit.

*Soit fait comme il est désiré.* Be it done as is desired.

*Sapientes, fideles, et animosi.* Wise, faithful and spirited.

*Scintilla juris.* A spark (or glimmer) of law or right. If lands are conveyed by a father on the marriage of his son to trustees to the use of the father in fee until the marriage, and then to the use of the son for life, the question which formerly arose under such a settlement was, Who was seised to the use of the son on the marriage? the Statute of Uses having taken the whole of the seisin of the trustee and given it to the settlor. In answering the question it was held, that there remained in the trustees a *scintilla juris*, or possibility of being seised to the use of the son, and when the marriage took place seisin shifted from the settlor to the trustees, the possibility being then converted into a fact; but now by 23 & 24 Vict. c. 38, every use takes effect as it arises by virtue of the original seisin of the trustee without the necessity of any *scintilla juris* remaining in him.

*Spondes peritiam artis.* You shall promise professional skill.

*Sit omnis vidua sine marito duodecim menses.* Every widow shall be twelve months without a husband.

*Securitas legatorum utilitati quæ ex pœna est præponderat.* The security of ambassadors is of more weight than the advantage derived from punishment.

*Sacerdos interroget dotem mulieris, et si terra ei in dotem detur tunc dicatur psalmus iste, &c.* The priest shall inquire the endowment of the woman, and if land be given her in dower, then shall be said that psalm, &c.

*Scripture est common ley, sur quels tous manieres de leis sont fondés.* Scripture is common law, on which all kinds of laws are founded.

*Traditionibus dominia rerum, non nudis pactis transferuntur.* The ownership of things is transferred by actual delivery and not by naked compacts.

*Trinoda necessitas,—expeditio contra hostem, arcium constructio, et pontium reparatio.* The triple obligation,—marching against a foe, building citadels, and repairing bridges.

*Tres faciunt collegium.* Three form a corporation.

*Tenetur se purgare is qui accusatur, per Dei iudicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.* An accused person is bound to clear himself by God's judgment; to wit—by hot iron or by water, according to the man's position; if a free man, by a hot iron; if a countryman, by water.

*Trina admonitio.* The third warning.

*Tradet fidejussores de pace et legalitate tuendâ.* He shall hand over securities for keeping the peace and the law.

*Tam immensus aliarum super alias acervatarum legum cumulus.* So vast a load of laws piled one on the top of another.

*Terra Walliæ, cum incolis suis, prius regi jure feodali subjecta, jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita.* The land of Wales, with its inhabitants, formerly subjected to the king by feudal right, was now changed into the property of ownership, and annexed and joined to the Crown of the kingdom of England as part of the same body.

*Tenendum per servitium militare, in burgagio, in libero socagio, &c.* To hold by military service, in burgage, in free socage, &c.

*Testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti, ad id faciendum se ingerere.* Executors of a will should be those whom the testator has chosen for this purpose, and to whom he has committed the trust; but if the testator has appointed no executors, the nearest of kin to the deceased can take that duty on themselves.

*Terræ dominicales regis.* Demesne lands of the crown.

*Tanquam testamentum inofficiosum.* As an informal will.

*Thesaurus inventus.* Treasure-trove.

*Tenaunt per lei d'Engleterre.* Tenant by the law of England.

*Ut pœna ad paucos, metus ad omnes perveniat.* That punishment may come upon few, but fear upon all.

*Ut citra mortis periculum, sententia circa eum moderetur.* That on this side the danger of death, sentence concerning him may be modified.

*Unum qui consilium daret, alterum qui contrectaret, tertium qui receptaret et occuleret; pari pœnæ singulos abnoxios.* One who gave the advice, a second who laid hands on the goods, and the third who received and hid them—each one liable to a similar penalty.

*Ubi scelus est, id quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames qui sunt, vel qui futuri sunt, rei.* Where that crime exists, which it is unprofitable to know, we order laws to rise and legislation to arm itself with an avenging sword, so that those scoundrels who are guilty of it, or are going to be so, may be punished with the severest penalties.



*Ubi cunque fuerimus in Angliâ.* Wherever we may be in England.

*Unius responsio testis omnino non audiat.* The evidence of one witness only shall not be heard.

*Ut martius populus aliquid sibi terræ daret, quasi stipendium; cæterum, ut rellet, manibus atque armis suis uteretur.* That the military nation should give them some land as pay; but that it should employ their labour and arms as it chose.

*Ubi nullum matrimonium, ibi nulla dos.* Where there is no matrimony, there is no dowry.

*Ut res magis valeat quàm pereat.* That the matter may flourish rather than perish.

*Usque filum aquæ.* Even to the middle of the stream.

*Ut de honore.* As of honour.

*Ut de coronâ.* As of the crown.

*Usus fructus.* Temporary right of using.

*Ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit publicè proclamari et firmiter teneri et observari faciat.* To cause those statutes and all articles contained in the same to be publicly proclaimed in each separate place where he shall see it expedient, and to be firmly upheld and kept.

*Utrum tantum terræ sit libera eleemosyna pertinens ad ecclesiam ipsius, an laicum feodum.* Whether so much land is free alms belonging to his church or lay property.

*Ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis.* Where any one shall have endowed his wife generally, of all his lands and tenements.

*Virtute officii.* By virtue of office.

*Vigilantibus, non dormientibus, jura subveniunt.* Laws help those who are awake, not those who are asleep.

*Victus victori in expensis condemnandus est.* The loser in a suit must pay costs for the winner.

*Volenti non fit injuria.* No wrong is done where the person is willing.

*Voluntas regis in curiâ, non in camerâ.* The will of the king in the court, not in the chamber.

*Verba intentioni debent inservire.* Words ought to be made subservient to the intent.

*Vos poveres communes prient et supplient, pur Dieu et en œuvre de charité.* Your poor commons beg and pray, for the love of God and as a work of charity.

*Viri magnæ dignitatis.* Men of great honour.

*Viginti annorum lucubrationes.* Night studies of twenty years.

*Villana faciunt servitia, sed certa et determinata.* They perform base, but certain and determined, services (said of tenants of lands of privileged villenage).

*Voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit.* A righteous decree of our will, according to what a man wishes to be done after his death.

*Vetus depositio pecuniæ.* An ancient deposit of money.

*Verba fortius accipiuntur contra proferentem.* Words are received more strongly against the grantor.

*Venditio per mutuam manuum complexionem.* A sale by the mutual grasping of the hands.

## APPENDIX B.

### USEFUL HINTS.

#### THE INTERMEDIATE EXAMINATIONS, 1882.

THE following is a copy of the notice issued by the Law Society in July last respecting these Examinations:—

“ The elementary works selected for the Intermediate Examination of persons under Articles of Clerkship for the year 1882 will be:—

“ Stephen’s Commentaries on the Laws of England, with the exception of Book IV. on Public Rights, forming portions of Vols. 2 and 3. 7th or any subsequent Edition.

“ Candidates are required to be examined within the six months next succeeding the day on which they shall have completed half of the term of service.

“ Candidates are required to give to the Secretary of the Incorporated Law Society at least *thirty days’ notice* before the date of the Examination at which they propose to be examined within the limit above mentioned, and at the same time to leave their Articles of Clerkship, and Supplemental Articles (if any) duly stamped and registered, together with a Certificate of their having passed the Preliminary Examination (unless they shall have been exempted therefrom), and Answers to the Questions as to due service and conduct up to that time. Prints of these Questions and of the Form of Notice can be obtained on application at the office of the Incorporated Law Society.

“ Candidates who apply to be examined under the Fourth Section of the Solicitors Act, 1860, may, on application, obtain copies of the further Questions relating to the ten years’ service antecedent to the Articles of Clerkship; and such Questions, duly answered, must be left at the time of giving notice.

“ Candidates who fail to pass, or attend at the Examination for which they have given notice, may attend at any subsequent Examination. A *renewed* notice must, in that case, be given fourteen days at least before the date of such subsequent Examination.

“ The Examinations will be held at the Hall of the Society, Chancery Lane, London, on the following days in 1882, viz.:—

Days of Examinations.	Last Day for giving Notice and depositing Articles, &c.	Last Day for giving <i>renewed</i> Notice and depositing Articles, &c.
Thursday, 19th Jan. at 10.	Monday, 19th Dec. 1881.	Wednesday, 4 Jan. 1882.
Thursday, 27th April, at 10.	Monday, 27th March, 1882.	Wednesday, 12th April, 1882.
Thursday, 22nd June, at 10.	Monday, 22nd May, 1882.	Wednesday, 7th June, 1882.
Thursday, 9th Nov. at 10.	Monday, 9th Oct., 1882.	Wednesday, 25th Oct., 1882.

“ The fee payable on giving Notice of Examination is £3, and for a *renewed Notice* £1:10s. Cheques or Post Office Orders should be crossed ‘Messrs. GOSLINGS & SHARPE.’ ”

In connection with the Examination and this notice candidates for the Intermediate should observe particularly the following points :—

(a) The notice only relates to the examination of the present year, but as there is but little chance of any alteration being made for the year 1883, candidates who will present themselves for the Intermediat Examination during that year will do wisely to read the subject selected for the present year—Stephen's Commentaries on the Laws of England (omitting Book IV.); and even if the subject is changed, the benefit derived from reading Stephen's Commentaries will be invaluable to him.

(b) Although the examiners have allowed the 7th edition of the Commentaries for 1882, yet as that edition was published in 1874, and as so many alterations have been made in the law since that year, students are strongly recommended, if they have not already purchased a copy of Stephen, to buy the 8th edition, and not the 7th; and this recommendation particularly applies to those who are not going in for their examination till 1883, as in all probability the 7th edition will not be allowed after this year.

(c) Those students who have already purchased the 7th edition of the Commentaries are advised to borrow the 8th edition, and make the necessary alterations.

(d) Though it may seem manifestly unfair, yet the fact remains that questions are asked at the Intermediate which are only given in the 8th, and not in the 7th, edition of Stephen; and this fact alone will be sufficient to show the necessity for readers of the 7th edition to note up the recent alterations. In verification of this statement our readers are referred to questions 14 and 19 in November, 1881; question No. 13 in April, 1881; question 14 in January, 1881; and questions 12 and 19 (parts of) in November, 1881.

(e) The student *cannot* present himself for Intermediate Examination until after half of his term of articles has expired, and he *must present himself* at some examination within six months of the expiration of such half-term; and, if he so presents himself, although he does not pass, yet if he passes within twelve months after his half term has expired, he will have complied with the rules, and will not have his Final Examination postponed.

(f) When giving the notice of his intention to present himself for the Examination, the Student must also leave with or send to the Law Society the following documents, &c. :—(1) His Articles of Clerkship; (2) His Certificate of passing the Preliminary Examination, or his order dispensing with that Examination; (3) Questions as to service duly answered by his principal and himself (with certain additional questions answered if he was articulated under the ten years' system); (4) His Examination fee of £3, or of £1:10s. if he has been previously in for Examination and postponed.

(g) On delivering these documents two receipts will be handed to him—one for the fee paid, and the other for the articles. This latter receipt must be carefully preserved, for its production is required when any further dealing with the articles is necessary.

(h) The result of the Examinations is now made known by the publication of a list of the successful Candidates in the "Times" of the third Saturday following the Examination, so that Students are kept in suspense for sixteen days.

(i) Just before the Examination two clear days' holidays should be taken, and when in for Examination the following rules may with advantage be observed:—

1. Read the paper carefully through, marking in the margin any statute which may occur to you as bearing on a particular question; and marking those questions which you can answer without difficulty, so that you may first answer them before confusing yourself by puzzling over the more difficult questions.
2. Answer the questions as fully as possible, and thus show the Examiners that you have done the work, and be careful to see that in your excitement and anxiety you do not omit or mis-read any part of the question.
3. As only twenty-one questions—divided into three heads of seven questions each—are asked at the Intermediate, and as six hours are allowed for the work, you will have plenty of time, and there is no excuse for any carelessness or want of thought in your answers.
4. Avoid making guesses, as by guessing you will probably be a loser instead of a gainer.
5. Before handing in your papers go carefully over each question with your answer, to see that all is as correct as you can make it.
6. There is no Honorary distinction at the Intermediate; but yet every Candidate should endeavour to do as well as he possibly can, in the same way as if there were competition, and *no one* can afford to be careless at an Examination.

(j) The following is the form of Notice to be given before going in for Examination, a printed copy of which will be forwarded for filling in on application to the Secretary of the Law Society, Chancery Lane, W.C.:—

“FORM OF NOTICE.

“Notice is hereby given that A. B., who is under articles of clerkship to C. D., of ———, &c., intends to present himself at the Intermediate Examination to be held in the month of ——— next.

“Dated this ——— day of ———, 188 .

“ (Sign here.)

“ (Here add present address of Candidate.)

“To E. W. WILLIAMSON, Esq.

“Secretary of the Incorporated Law Society.”

If a renewed notice is given, the word “Renewed” must be written at the head.

(k) The following Table shows the results of the Intermediate Examinations, 1881:—

RESULTS AT THE INTERMEDIATE DURING 1881.

Examinations.	Number of Candidates.	Number Passed.	Number Postponed.	Percentage of Failures.
January .....	200	127	73	36½ per cent.
April .....	310	220	90	29 per cent.
June .....	274	162	112	41 per cent.
November .....	481	380	101	21 per cent.
TOTAL .....	1265	889	376	31½ average %.

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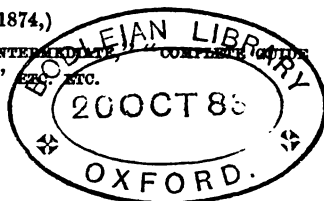
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The 3rd Edition of "The Intermediate Law Examination Made Easy" is a complete Guide to the 8th Edition of the Commentaries; and as it was published after the Conveyancing Act, 1881, was passed, the provisions of that statute are duly incorporated in the Guide, herein anticipating the 9th Edition of the Commentaries; but as the Acts for 1882 are not dealt with in the Guide, and as doubtless a great many Students have bought the 8th Edition of the Commentaries and the 3rd Edition of the Guide, it seems desirable to publish the following Supplement, giving the provisions of the statutes of which the Examiners require a knowledge at the hands of Candidates for the Intermediate Examinations of 1884.

The following pages will, it is hoped, be acceptable to all Students for the Intermediate, whether they are using the 8th or the 9th Edition of the Commentaries, as giving them within a few pages all the main provisions of the important Acts on which, from the terms of the notice, it may be fairly assumed a great many questions next year will be framed.

The Conveyancing Acts, 1881 and 1882, and the Settled Land Act, 1882, bear mainly on the First Volume of the Commentaries, and the following epitome of those statutes should therefore be added to the List of Statutes given in the Guide to Stephen, 3rd ed., on p. 97, and be got up as additional work for the Fifth Week; while the Married Women's Property Act, 1882, bears mainly on the Second Volume of the Commentaries, and must be added to the List of Statutes given on pp. 182—186, and got up as additional work for the Eighth Week.

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## THE CONVEYANCING ACT, 1881.

(44 & 45 VICT. c. 41.)

The Act came into force on 1st January, 1882, and does not extend to Scotland. (Sect. 1.) The object of the Act is to simplify and improve the practice of conveyancing, and for vesting in trustees, mortgagees, and others, various powers commonly conferred by express provisions contained in settlements, mortgages, &c., and for amending in various particulars the law of property, &c.

The provisions of the statute which we epitomise below must be regarded by the student in connection, for the most part, with Volume I. of the Commentaries—that volume dealing with the law of real property; but the provisions relating to trustees bears on the subject of trustees dealt with in Volume III. of Stephen, in his chapter on "Equity;" while those relating to "executors" have application to the chapter on "Wills and Administrations;" those relating to "married women" apply to the chapter on "Husband and Wife;" and those relating to "infants" to the chapter on "Parent and Child," and "Guardian and Ward"—all of which are contained in Volume II. of the Commentaries.

For the most parts, the provisions of the Act only apply to instruments coming into operation on or after the 1st day of January, 1882—on which day the Act came into operation—and only apply in as far as they are not excluded by the agreement of the parties; but some few of the clauses of the Act are retrospective, while others are compulsory, and take effect notwithstanding any stipulation to the contrary. To these due attention will be called in the epitome of the Act, which we now proceed to give.

### CONTRACTS FOR SALE.

With the view of protecting vendors who enter into an open contract for sale of property, and generally to ameliorate the law relating to such contracts, sect. 3 of the Act provides :—

- (1) A purchaser of a leasehold interest cannot call for the title to the leasehold reversion.

[This extends the provisions of the Vendor and Purchaser Act, 1874—that statute making a similar provision as to the freehold reversion. By sect. 13 of the Act, an intending sub-lessee cannot call for the title to the leasehold reversion; and by sect. 4 of the Conveyancing Act, 1882, a preliminary contract for a lease cannot be called for by an intending assignee.]

- (2) A purchaser of enfranchised copyholds cannot call for the title to make the enfranchisement.
- (3) A purchaser cannot call for the production of any document which is anterior in date to the commencement of the title; and he must assume that recitals contained in abstracted documents of any deed, &c., forming part of the prior title, are correct.
- (4) A purchaser of a lease must assume (1) that the lease was duly granted; and (2) on production of the receipt for the last rent, that all the covenants, &c. in the lease have been performed up to the date of completion.
- (5) A purchaser of an under-lease must assume that both lease and under-lease were duly granted, and, on production of receipt for the last rent due under the under-lease, that all the covenants of both lease and under-leases have been performed up to date of completion.
- (6) This sub-section throws on to the purchaser all the usual expenses connected with a purchaser's requisitions regarding the title—*e. g.*, the expense of production and inspection of documents not in the vendor's possession—of certificates, declarations, &c., and of copies of documents retained by the vendor.
- (7) A purchaser of two or more lots held under the same title cannot have more than one abstract except at his own expense.

This section only applies to sales properly so called (*i. e.* not to mortgages and leases).

Sect. 4 provides that when a vendor of a freehold interest in lands dies after contract, and before completion, the personal representatives may convey the land to the purchaser.

[Formerly the heir or devisee in whom the legal estate vested was a necessary party to the conveyance.]

By sect. 5, on the sale of land subject to an incumbrance, whether in the nature of an annual sum or a capital sum, the Court, *i. e.* the Chancery Division of the High Court, can allow a sum to be paid into Court to meet the incumbrance and expenses, and can declare the lands free from the incumbrance.

#### CONVEYANCES—GENERAL WORDS—COVENANTS FOR TITLE, ETC.

Sect. 6 incorporates into every conveyance made on or after 1st January, 1882, of—(1) land, (2) of land with buildings thereon, (3) of a manor, the usual general words which have hitherto been inserted by conveyancers.

Sect. 7 incorporates into conveyances made on or after 1st January, 1882, in the absence of a contrary intention, the usual covenants for title, provided the person conveys in the particular character referred to in the section, that is to say :—

In *conveyances for value*, excluding mortgages, the usual qualified covenants are implied by the vendor if he conveys, and is expressed to convey, as *beneficial owner*.

In *mortgages* the usual absolute covenants for title by the mortgagor if he conveys, and is expressed to convey, as *beneficial owner*.

In *settlements* a limited covenant for further assurance by the settlor if he conveys, and is expressed to convey, as *settlor*.

In *conveyances* by a person who conveys, and is expressed to convey, as *trustee or mortgagee*, or as committee of a lunatic so found by inquisition or under an order of the Court, or as the personal representative of a deceased person, a covenant applying to his own acts only against incumbrances.

In *conveyances* in which it is expressed that one person conveys by the direction of another, who is expressed to direct as beneficial owner, a covenant by the person directing the conveyance as if he had conveyed as beneficial owner.

In conveyances by a wife, as *beneficial owner*, the husband also conveying as *beneficial owner*, the usual covenants for title, by both husband and wife, are implied in addition to covenants by the husband as the party directing the conveyance.

These implied covenants run with the land for the benefit of each successive owner.

By sect. 8 a purchaser cannot, as formerly, insist on having the conveyance executed in his own presence or that of his solicitor at the vendor's expense, but he may, at his own cost, appoint any person (including his solicitor) in whose presence the deed shall be executed.

Sect. 9 substitutes for the usual covenant to produce deeds and to keep them safely, entered into by a person who receives or keeps deeds, &c., relating to property in which some third person has an interest, an *acknowledgment* of the right of such third person to have the deeds retained produced, and to have copies thereof, or extracts therefrom, delivered to him, and an *undertaking* to keep the deeds, &c. safe, whole and uncanceled, and to pay damage in the event of the undertaking being broken.

The acknowledgment and undertaking run with the deeds, so as to bind every person into whose possession they may come, but only so long as they remain in his possession.

[The provisions of the above sections must be considered by the Student in connection with the Chapters in Stephen on "Title by Alienation" and "Deeds" (Book II. Pt. I. Chaps. XV. and XVI.)]

#### LEASES.

Sects. 10, 11 and 12 relate to the subject of the assignment of the reversion in a lease. By sect. 10 the rent reserved by a lease and the benefit of the lessee's covenants relating to the subject-matter of the lease, and the benefit of the condition of re-entry, and every other condition, go with the reversion, even though that reversion be severed; and by sect. 11 the obligation of a covenant entered into by the lessor with regard to the subject-matter of the lease, runs with the reversion and binds the person entitled to the reversion, and this, notwithstanding the reversion may have been severed, and by sect. 12, when the reversion of a lease has been severed, every condition in the lease is to be apportioned.

[These sections enlarge the provisions of 32 Hen. 8, c. 34, referred to in Stephen, in the Chapter on "Estates on Condition" (Book II.



Part 1, Ch. IV.), and the effect may be thus shortly stated. A. makes a lease of lands to B.; A., the reversioner, assigns half of the lands, subject to the lease, to C., and the other half to D. Here the reversion is severed, and by sect. 10, both C. and D. will be entitled to the benefit of B.'s covenants, and by sect. 11, they will be liable to perform A.'s covenants, and by sect. 12, the conditions in the lease will be apportioned, so that C. and D. may properly share the benefits and burdens between them.]

By sect. 13, on a contract to grant a sub-sub-lease, the intended lessee shall not have the right to call for the title to the leasehold reversion.

[This extends the provisions of sect. 3 of the Act, see *ante*, p. 5.]

Sect. 14 prevents a landlord from taking advantage of his condition of re-entry by ejecting a tenant for a breach of covenant. It provides that no proceedings to evict a tenant for breach of covenant shall be taken unless and until a notice requiring the breach to be made good has been served on the tenant, and he has failed for a reasonable time to make good the breach, or pay reasonable compensation therefor. An action to enforce the right of re-entry may then be brought, but the Court can grant the tenant relief on such terms, or without terms, as it thinks fit. The section applies not only to leases but also to underleases, but it has no application to a breach of covenant not to assign or underlet the premises, nor to a breach of certain covenants in mining leases, respecting the inspection of the accounts, or machines, or the mine, &c., and for these breaches no relief can be obtained; nor does the section apply to breaches of covenant to pay rent, with respect to which relief can only be obtained as before, that is if relief is sought within six months of the tenant being ejected, on payment of all rent, arrears and costs.

The section applies to leases made before as well as after 1st January, 1882, and its provisions cannot be nullified by any agreement of the parties.

[This section bears on the subject of conditions of re-entry, treated of in Stephen, Vol. I., in his Chapters on "Estates on Condition" and "Common Law Conveyances," Book II. Pt. I. Chs. VI. and XVII.]

#### MORTGAGES.

By sect. 15, a mortgagor can compel the mortgagee, if he is not or has not been in possession, to transfer the premises and the debt to a

third person. Formerly the mortgagee could refuse to transfer. The section applies to mortgages made before as well as after 1st January, 1882, and takes effect notwithstanding any stipulation to the contrary between the parties.

[The right conferred by this section can be exercised notwithstanding there are several incumbrances, but subject to the restrictions laid down in sect. 15 of the Conveyancing Act, 1882. (See *post*, p. 23.)]

By sect. 16, a mortgagor can compel the mortgagee to allow him to inspect or to make copies of or extracts from the documents of title relating to the mortgaged premises. This applies to mortgages made before as well as after the 1st June, 1882, and takes effect notwithstanding any contrary stipulation.

Before the Act the mortgagor had no such power.

Sect. 17 abolishes the consolidation of mortgages where the mortgages or one of them are made on or after 1st January, 1882, unless the right to consolidation is reserved.

So that if A. has mortgaged Whiteacre estate to B. and also Blackacre estate to him to secure different sums, he can redeem one estate without the other; whereas, formerly, B. could resist the redemption of Whiteacre unless A. was also prepared to redeem Blackacre. This was consolidation.

By sect. 18, a mortgagor or mortgagee, when in possession, may make a lease of the mortgaged lands binding on the other in conformity with the terms and conditions laid down in the section, that is to say, provided the term does not exceed, if an agricultural or occupation lease, 21 years, or a building lease, 99, and the lease be made to take effect within a year of its date, and the best rent be reserved (in the case of a building lease a nominal rent for the first five years may be reserved), and a condition of re-entry if the rent is not paid within 30 days of its falling due. When a mortgagor makes a lease he must deliver a counterpart to the mortgagee within a month.

[Before this provision a lease of mortgaged premises could only be safely accepted by the lessee if made by both mortgagor and mortgagee.]

Under sects. 19—24, a mortgagee *by deed* has the following powers conferred upon him:

- (1) A power of *selling* the mortgaged premises by public auction or private contract, subject to such conditions as he thinks

fit, and without responsibility for loss, provided (a) there has been default in payment of the mortgage money for three months after notice requiring payment has been served on the mortgagor; *or* (b) interest is in arrear for two months; *or* (c) there has been a breach of any provision in the mortgage deed other than a covenant for payment of the mortgage money or interest.

The money derived from the sale is to be applied in the usual way, viz., in paying the costs of the sale, the mortgage money and interest, and handing any balance to the person entitled to the premises subject to the mortgage.

The mortgagee's receipt is a sufficient discharge for the money paid to him.

- (2) A power, immediately after the date of the mortgage, of *insuring* the premises against fire in the sum (if any) named in the mortgage deed; and, if no sum named, in a sum not exceeding two-thirds of the amount which would be required in case of total destruction to restore the property insured.

The money received from the insurance may be applied, if the mortgagee so wishes, in making good the loss or damage, or in discharge of the money due under his mortgage.

- (3) A power, when the right of selling the property has accrued (*see supra*), of *appointing a receiver* of the property, and of removing him from time to time. The receiver so appointed is the agent of the mortgagor, and he applies the monies received by him in the manner laid down in the Act.
- (4) A power, when in possession, of *cutting timber* and other trees ripe for cutting (not being trees left standing for shelter or ornament), or of contracting for cutting and sale of trees for any period not exceeding twelve months from the date of the contract.

By sect. 25, in an action for the redemption of mortgaged premises, any person entitled to redeem may have a judgment for sale instead of redemption.

In an action, either for redemption or foreclosure, any person interested may apply to the Court for a sale of the property, and the Court may make the order on such terms as it thinks fit.

[In an action of foreclosure, the Court could order a sale before

this Act under 15 & 16 Vict. c. 86; but the power to do this in redemption actions is quite new.]

The provisions of the eleven sections last considered (sects. 15—25) must be borne in mind in connection with what is stated on the subject of mortgages in the Chapter in Stephen on "Estates on Condition" (Book II. Pt. I. Chap. VI.).

#### STATUTORY FORMS.

Sects. 26—29 aim at making mortgages, and transfers and reconveyance of mortgages, as short and simple as possible.

By sect. 26, a statutory mortgage may be made in the form given in the schedule—comprising a few folios only, and yet giving to the mortgagee sufficient powers and rights to protect him.

By sect. 27, a mortgage made in the statutory form under sect. 26 may be transferred by one of the three statutory forms of mortgage given in the schedule.

By sect. 28, the covenant which is implied under sects. 26 and 27 in a statutory mortgage, or a statutory transfer of mortgage, where there are several mortgagors, is deemed joint and several; and the implied covenant where there are several mortgagees is deemed to be made with them jointly only, unless the amount is expressed to be secured to them in distinct sums, when the covenant is deemed a several covenant with each mortgagee in respect of the sum secured to him. By sect. 28, a re-conveyance of a statutory mortgage may be in the form given in the schedule to the Act.

[These sections must be remembered in connection with the Chapter in Stephen on "Deeds" (Book II. Pt. I. Chap. XVI.).

#### DEVOLUTION OF LEGAL ESTATE.

By sect. 30, on the death of a sole mortgagee or trustee of an estate of inheritance, or limited to the heir as special occupant, the legal estate vests like a chattel real in his legal personal representatives, and this whether he dies testate or intestate; and the personal representatives have full power to act in the trust, &c.

[This section facilitates the dealing with the legal estate on the death of sole mortgagee or trustee, as it renders the concurrence of the heir or devisee unnecessary, and will, in most cases, render it unnecessary for the Court to appoint a new trustee under the pro-

visions of 13 & 14 Vict. c. 60, referred to by Stephen in the Chapter on "Uses and Trusts" (Book II. Pt. I. Chap. IX.): compare with sect. 4 of the Act, *supra*, p. 6.

#### TRUSTEES AND EXECUTORS.

Sects. 31—38 deal with the subject of trustees and executors, and bear indirectly on the Chapter in Stephen on "Equity in its Relation to Law" (Book V. Chap. IX.), and in the Chapter on Wills and Administration (Book II. Pt. II. Chap. VII.). By sect. 31, a new trustee may be appointed by writing under the hand of a person nominated in the instrument, and if no one nominated by the surviving or continuing or refusing or retiring trustee, or by the personal representative of the last surviving or continuing trustee, in cases where a trustee (a) is dead, (b) remains out of the United Kingdom for twelve months, (c) desires to be discharged, (d) refuses or is unfit or incapable of acting in the trust.

The number of trustees may be increased or decreased, but a trustee cannot, where there were originally two or more trustees, be discharged under this section unless there are two trustees left.

By sect. 5 of the Conveyancing Act, 1882, separate trustees may be appointed in respect of different parts of the property held on distinct trusts. (See *post*, p. 21.)

By sect. 32, a trustee may retire without having another appointed in his place, provided (a) he expresses his wish to do so by deed; (b) the removing trustees (of whom there must be two at least) and the person, if any, nominated to appoint new trustees, consent by deed; (c) the necessary steps are taken to vest the property in the continuing trustees alone.

By sect. 33, trustees appointed by the Court have full power to act as well before as after the property is vested in them. This is so also with regard to trustees appointed under the provisions of sect. 31, *supra*.

By sect. 34, with the exception of copyhold property, land conveyed by way of mortgage for securing money subject to the trust and stocks, shares and property, transferable in books kept by a company, &c., a declaration contained in a deed is sufficient to vest any property, the subject of a trust, in a new trustee appointed to perform the trust, or in the continuing trustee in the case of a trustee retiring under the provisions of sect. 32, *supra*.

By sect. 34, trustees, in whom a power of sale or a trust for sale is vested, may sell the property by public auction or private contract, together or in lots, subject to such conditions as they think fit, with power to vary or rescind the contract, and to buy in at any auction, and resell without responsibility for loss.

[It must be observed that this section does not confer on trustees a power of sale, but merely declares how a trust or power for sale vested in trustees may be carried out.]

By sect. 36, the receipt of trustees for money securities, or other personal property or effects payable, &c. to them, is a sufficient discharge, whether the trust was created before or after the 1st January, 1882.

By sect. 37, an executor may pay debts, &c., on any evidence he thinks sufficient.

An executor, or two or more trustees acting together, or a sole-acting trustee having authority to act by himself, may compound debts, allow time for payment, or settle any matter without being responsible for any loss occasioned.

The section applies as well to executorships and trusteeships created before as after the act, and as to executors, whether there is a contrary intention expressed in the will or not, but as to trustees only in the absence of a contrary intention.

By sect. 38, a trust or power given to two or more executors or trustees may be executed by the survivor or survivors of them.

[This is extended by sect. 6 of the Conveyancing Act, 1882, whereby one trustee may disclaim, and the other trustee may act. See *post*, p. 21.]

#### MARRIED WOMEN.

By sect. 39, the Court may make an order binding the separate estate of a married woman, notwithstanding a restraint on anticipation, provided it appears to be for her benefit to do so, and she consents.

[Previously to the enactment, however desirous it might be to release a restraint on anticipation, the Court could not release it.]

By sect. 40, a married woman, whether an infant or not, may, by deed executed on or after the 1st January, 1882, appoint an attorney to execute a deed or do any other act which she herself might do.

[This and the previous section must be borne in mind in connection

with the Chapter on Husband and Wife, in Vol. II. (Book III. Ch. IV.) Sect. 7 of the Conveyancing Act, 1882, also bears on the subject of married women. See *post*, p. 21.]

#### INFANTS.

By sect. 41, with the view of enabling infants' lands to be sold and leased, it is provided that the lands of which an infant is seised in fee simple, or for a leasehold interest at a rent, the land is to be deemed settled land within the Settled Estates Act, 1877.

[This section was difficult of operation, and may now be considered to have given way to the simple provisions contained in the Settled Land Act, 1882, whereby infants' lands can be readily leased and sold. See *post*, 27.]

By sect. 42, trustees of the settlement appointed for the purpose, if any, and, if none so appointed, the trustees of the settlement having a power of sale, and, if none, the trustees appointed by the Court, may enter into and continue in possession of lands belonging to a person who is an infant, and, being a woman, is also unmarried.

The trustees are to manage the land, with power to make arrangements with tenants, and generally deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, as and subject to which the infant could, if of full age, cut the same. Out of the income of the land, &c., the trustees may pay the expenses of management, keep down any annual sum or interest on any principal charged on the land, apply any part they think proper for the maintenance, education or benefit of the infant, and invest the residue, and accumulate the income of the investments, and stand possessed of the accumulated fund for the infant on his attaining twenty-one, or, if the infant is a woman, and she marries before twenty-one, on trust for her separate use, her receipt therefor being a good discharge; but if the infant dies under twenty-one, and, if a female, without having married, then the trustees hold the fund upon the trusts of the settlement, if any, otherwise for the personal representatives of the infant.

By sect. 43, trustees holding property in trust for an infant, either for life or for any greater interest, and whether absolutely or con-

tingently on his attaining twenty-one, or on the occurrence of any event before his attaining that age, may apply, by payment to the parent or guardian, or otherwise, the income, or any part, for the infant's maintenance, education or benefit; and this whether any other fund applicable for the purpose, or any other person bound by law to provide for the infant's education or maintenance. The residue of the income to be accumulated by way of compound interest by investment.

The section applies to the income of property given to infants by instruments coming into operation as well before as after the 1st January, 1882, but only as far as a contrary intention is not expressed.

[These four sections relating to infants must be borne in mind when reading the Chapters in Volume II. relating to Parent and Child, and Guardian and Ward (Book III. Chaps. III. and IV.).]

#### RENT CHARGES.

Sects. 44 and 45 deal with rent charges and other annual sums charged on land, and so bear on the Chapters in Stephen relating to Incorporeal Hereditaments (Book II. Pt. I. Ch. XXIII.).

By sect. 44, a person entitled to receive out of land, or out of the income of land, an annual sum may, if the same is not paid for twenty-one days, distrain on the land charged therefor; and, if not paid for forty days, may enter upon and keep possession of the land charged until all arrears and costs are paid; or, instead of so entering and keeping possession, he may demise the land charged to a trustee for a term of years, with power to the trustee to mortgage, sell or demise the land, or by any other reasonable means to raise and pay the annual charge and all arrears thereof and costs.

By sect. 45, the owner of land which is subject to a quit rent, chief rent, rent charge, or other annual sum (not being tithe rent charge or rent reserved on a sale or lease, or a sum issuing out of land not being perpetual), may redeem the rent, &c., by applying to the Copyhold (now Land) Commissioners and paying or tendering the amount certified by the commissioners to the owner of the rent, and the commissioners, on proof of payment or tender, certify that the land is redeemed from the rent. The section applies equally to rents payable at, as to those created after, the 1st January, 1882.



## POWERS OF ATTORNEY.

Three sections relate to powers of attorney and do not bear directly on any Chapter in Stephen. Indirectly they bear on the subject of "powers" treated of in the Chapter on Conveyances under the Statute of Uses (Vol. I.), and to the law of agency treated of in the Chapter on Contracts (Vol. II.)

By sect. 46, a donee of a power of attorney may execute or do any assurance or thing in and with his own name and seal as well as in the name and with the seal of the donor of the power.

By sect. 47, any person who makes a payment or does an act in pursuance of a power of attorney, shall not be liable in respect of the payment, &c., merely because the power of attorney was revoked, provided he had no notice of the revocation.

[So that if A., a purchaser of lands from B., pays the purchase money to C., who is authorized by power of attorney to receive it, C.'s receipt will discharge A., even though C.'s authority had been in some way revoked, provided A. knew nothing of the revocation. The provisions of this section are extended by sects. 8 and 9 of the Conveyancing Act, 1882, under which A. would be protected even if he knew of the revocation of C.'s authority, if the instrument creating the power was *expressed to be irrevocable*, and either it was made for a fixed time not exceeding one year or was given for value.]

By sect. 48 instruments creating powers of attorney, whether made before or after 1st January, 1882, *may* be filed at the Central Office, and copies of them may be obtained on payment of the fees prescribed.

## THE CONSTRUCTION AND EFFECT OF DEEDS, &amp;c.

By sect. 49, the word "grant" is not necessary to convey corporeal or incorporeal hereditaments.

By sect. 50, a man may convey freehold land or a chose in action to himself and another jointly, as he might convey to another person. So a man may convey such property to his wife, and a wife to her husband.

[Formerly freehold lands could only be thus conveyed by means of uses, *i. e.* if A. wished to convey to himself and B. he conveyed to C. to the use of A. and B.; now he would convey unto and to the use of A. and B.]

These last two sections must be borne in mind in connection with

the Chapter in Stephen on Conveyances under the Statute of Uses (Book II. Pt. I. Ch. XVIII.).

By sect. 51, a fee simple estate may be created in deeds by the words "in fee simple," without the word "heirs," and an estate tail by the words "in tail," without the words "heirs of the body," and an estate "in tail male" or "tail female" by using those words without the words "heirs male of the body," or "heirs female of the body."

[This section, which merely substitutes one class of technical words for another, bears on the Chapter on Freehold Estates of Inheritance (Book II. Pt. I. Ch. III.), in which attention is drawn to the strict rule which formerly prevailed, that an estate in fee simple could not be created by deed without the word "heirs," and an estate tail without the words "heirs of the body." The student will bear in mind that these words "heirs" and "heirs of the body" can still be, and constantly are, used in practice.]

By sect. 52, a power, whether coupled with an interest or not, can be released by deed, or there may be a contract not to exercise the power.

[When a person has a power over property and an interest in it as well, the power is called either a "power appendant" or a "power in gross," according as the exercise of the power does or does not affect his interest. Thus if a tenant for life have a power to lease the lands, this is a power *appendant*, because by making a lease he defeats, more or less, his own interest; while if a tenant for life have a power to jointure a wife out of the land, he has a power *in gross*, since the jointure only takes effect on his death. When a man has a power over property, but no interest in it, the power is called a *collateral* power, *e. g. a power given to an executor to sell freehold lands*. Under the above section the person in whom a power is vested can, whether that power is appendant, in gross, or collateral, release or contract not to exercise it. Before this section collateral powers could not be released, nor was a contract not to exercise them of any effect.]

By sect. 53, a deed, whether executed before or after 1st January, 1882, expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, may be read and have effect as if indorsed on the previous deed, or it contained a full recital thereof.

By sects. 54 and 55, a receipt in the body of a deed is sufficient discharge without the indorsed receipt, and a receipt, either in the

body or indorsed, is sufficient evidence that the money was paid, in favour of a purchaser, without notice that the money had not been paid.

By sect. 56, a purchaser is justified in paying the consideration money to a solicitor, who produces a deed having in its body a receipt, the deed being duly executed, or having a receipt indorsed and duly signed by the person entitled to give a receipt for the consideration.

[Before the Act the purchaser was justified in insisting on a written authority before he paid the money. The section does not, a recent case decides, apply where trustees are the persons who are entitled to the consideration money (see *In re Bellamy*, Law Notes, August, 1883).]

By sect. 57, deeds in the form of, and using the expressions given in the schedule to the Act, are sufficient.

By sect. 58, a covenant if it relates to lands of inheritance, or devolving on the heir as special occupant, is deemed to be made with the covenantor, *his heirs and assigns*; and if it relates to other lands, is deemed to be made with the covenantor, *his executors, administrators, and assigns*, as if the words "heirs and assigns" in the one case, and the words "executors, administrators, and assigns" in the other, had been inserted.

By sect. 59, a covenant binds the "heirs," and the real estate of the covenantor, even though the "heir" is not named, and this applies to the covenants implied by the Act.

By sect. 60, a covenant made or implied, with two or more persons, to do any act is deemed to include, and by the Act implies, an obligation to do the act to and for the benefit of the survivors and survivor of the covenantees.

By sect. 61, where in a mortgage the sum advanced or any part is expressed to be advanced by or accruing to more persons than one, out of money, or as money belonging to them on a joint account, or the transfer is made to more persons than one jointly, and not in shares, the money is deemed to belong to them on a joint account as between themselves and the mortgagor, and the receipt in writing of the survivors or survivor, or the personal representatives of the last survivor, is a sufficient discharge, notwithstanding any notice to the payer of a severance of the joint account.

By sect. 62, freehold land may be conveyed to the use that a

person may have an easement or privilege in or over the land for an estate, &c. not exceeding the estate conveyed in the land.

[So that if A. wishes to convey an estate in fee simple to B., but he wishes to give C. and his heirs a right of way over the lands, he can do so by one deed, by conveying the lands to B. and his heirs, to the use that C. and his heirs have a right of way over the lands conveyed, subject thereto to the use of B. and his heirs. Formerly two deeds would have been necessary, one giving C. the right of way, and the other granting the land to B. subject to C.'s easement.]

By sect. 63, every conveyance, in the absence of a contrary intention, is effectual to pass all the estate, interest, claim, demand, &c. of the conveying parties.

[This section dispenses with the necessity of inserting the usual estate clause.]

By sect. 64, in construing the covenants or provisions which are implied by the Act, words importing the singular or plural number or the masculine gender, are to be read as also importing the plural or singular number, or as extending to females, as the case may require.

By sect. 65, a long term of years may, by a declaratory deed executed by the person entitled to the term, whether beneficially or as trustee, or executor, or administrator, enlarge the term into a fee simple estate, provided:—

- (a) The term was originally not less than 300 years.
- (b) There still are 200 years remaining unexpired.
- (c) There is no rent, or no rent of money value.
- (d) There is no condition of re-entry.
- (e) If the term is a sub-term, that the original term itself could be enlarged under the Act.

[These last two conditions are contained in sect. 11 of the Conveyancing Act, 1882 (see *post*, p. 22).]

The fee simple is held subject to the trusts, &c., to which the term was held subject, with the exception that the owner of the enlarged estate is also the owner of the mines, whether the term was originally created without impeachment of waste or not.

The section applies equally to terms created before as after the 1st January, 1882.

Sect. 66 protects solicitors and trustees who adopt or negative the Act from liability for the course adopted by them.

Sect. 67 lays down regulations as to the manner in which notices required or authorized by the Act to be served shall be served.

Sect. 68 is unimportant. It merely gives a short title to 5 & 6 Will. 4, c. 62.

Sect. 69 contains regulations respecting payment into Court and making applications to the Court under the Act. The Court having jurisdiction is the Chancery Division of the High Court, and all applications are made by summons in chambers.

Sect. 70 enacts that an order of the Court shall not as against a purchaser be invalidated on the ground of want of jurisdiction or of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

Sect. 71 is the repealing section, while—

Sect. 72 contains some special provisions applicable only to Ireland.



## THE CONVEYANCING ACT, 1882.

(45 & 46 VICT. c. 39.)

This statute was passed to further improve the practice of conveyancing, and to amend and explain in a few points the principal Act of 1881. It came into operation on 1st January, 1883, and its provisions are not, except in one or two instances to which attention is called in the following epitome, retrospective. The Act does not extend to Scotland (sect. 1).

### CONTRACTS FOR SALE.

By sect. 2, a purchaser may make an *official* search for judgments, crown debts, *lis pendens*, rent charges, annuities, writs of execution and extent, by delivering at the Central Office a requisition showing the person against whom the search is to be prosecuted; and the certificate of the officer is conclusive, affirmatively or negatively as the case may

be. A solicitor, and trustees and others in a fiduciary capacity so searching, are not answerable for any loss which may arise from error in the certificate.

By sect. 3, a purchaser is not prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or that of his counsel, solicitor, or agent as such, or would have come to his knowledge, or to that of his counsel, &c., had proper inquiries and inspections been made.

By sect. 4, where a lease, whether made before or after the 1st January, 1883, which has been made under a power, in a will, Act of Parliament, &c., is sold, the intending assign cannot call for production of any preliminary contract for or relating to the lease.

[These sections extend sect. 3 of the Act of 1881.]

#### TRUSTEES.

By sect. 5, on an appointment of new trustees with regard to a trust created as well before or after 1st January, 1883, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part of the trust property.

[This section extends sect. 31 of the Act of 1881.]

By sect. 6, a person to whom a power is given, whether before or after 1st January, 1883, and whether coupled with an interest or not, may disclaim the power, and the power may be exercised by the other or others of the persons to whom the power is given.

[This extends sect. 38 of the Act of 1881.]

#### MARRIED WOMEN.

By sect. 7, one commissioner instead of two commissioners can take the acknowledgment of married women to deeds executed under 3 & 4 Will. 4, c. 74, and other statutes requiring a deed acknowledged. No certificate of acknowledgment, nor affidavit, need be filed; the sections of 3 & 4 Will. 4, c. 74, requiring the certificate, &c., being repealed by this section, and the deed acknowledged takes effect from the time of the acknowledgment. A memorandum of the acknowledgment is endorsed on the deed.

[This section is but of little use, since, with regard to property acquired by married women on or after 1st January, 1883, a deed

acknowledged is not necessary, as by the Married Women's Property Act, 1882, the same can be disposed of by will or otherwise, as if a *feme sole*, and so an acknowledged deed will only be needed with regard to property acquired before the above date. As far as applicable, it must be borne in mind in connection with the Chapter in Stephen relating to Conveyances by Married Women, Book II. Pt. I. Chap. XIX.]

#### POWERS OF ATTORNEY.

By sect. 8, a power of attorney given for value, and expressed to be irrevocable, cannot, as far as a purchaser is concerned, be revoked; and a purchaser can safely act on the power, notwithstanding notice of revocation of the power.

By sect. 9, a power of attorney, whether given for value or not, and expressed to be irrevocable for a fixed period not exceeding one year from its date, cannot, as far as a purchaser is concerned, be revoked, so that a purchaser can safely act on the power, notwithstanding notice of its having been revoked.

[The effect of these two sections was given in connection with sects. 46 and 47 of the Conveyancing Act, 1881.]

#### EXECUTORY LIMITATIONS.

Sect. 20 places a restriction on executory limitations, by providing that where a person is seised of lands, with an executory gift over in default or failure of all or any of his issue, directly any issue attains the age of twenty-one, the limitation over is void.

[So that if lands are given to A. for life or in fee, and if he dies without issue, to B., directly any of A.'s issue attains twenty-one the gift over to B. is void, and A. can alienate the property in fee. This extends the provisions of the Wills Act, 1837, with regard to the words "die without issue," explained in the Chapter on Devises (Book II. Pt. I. Ch. XX).]

#### ENLARGEMENT OF LONG TERMS.

By sect. 11, sect. 65 of the Act of 1881 includes terms of years, whether the immediate reversion is freehold or not; but it does not extend to—

- (i) Any term liable to be determined by re-entry for condition broken;

- (ii) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

#### MORTGAGES.

By sect. 12, the mortgagee's right to compel a transfer under sect. 15 of the Act of 1881 can be enforced by each incumbrancer and by the mortgagor, notwithstanding an intermediate incumbrance, but the requisition of an incumbrancer is preferred to that of the mortgagor, and as to the incumbrancers a prior incumbrancer's requisition has precedence over that of a subsequent incumbrancer.

Sect. 13 merely relates to the effect of repeals made by the Act.



### THE SETTLED LAND ACT, 1882.

(45 & 46 VICT. c. 38.)

The provisions of this Act (which came into operation on 1st January, 1883, and which does not extend to Scotland) not having such an important bearing on the subjects dealt with in the Commentaries as those of the Conveyancing Acts have, and being but slightly touched upon by the editor of the 9th edition of the Commentaries, it is not proposed to go through the statute section by section, but merely to give an outline of its provisions at sufficient length to cover any likely question which may be set upon the Act at the Examinations.

The statute deals only with settlements of land, and so bears almost exclusively on Volume I. of Stephen, the Chapter in that volume specially affected by it being that which deals with the subject of "Freehold Estates not of Inheritance" (Book II. Pt. I. Chap. IV.), since the whole aim of the Act is to give to a tenant for life full powers of dealing with the settled estate as if an absolute owner, whether by way of sale or lease, exchange or partition, &c., provision being made by which those entitled in remainder or reversion are protected. The Settled Estates Act, 1877, fully referred to in Stephen, is not (with the exception of one section) repealed, but it is practically superseded, since the provisions of the Act of 1882 are so much wider and more beneficial. Moreover the Act of 1877 can be excluded by the settlement, and it is not for the most part retro-



spective, while the Act of 1882 cannot by any means be excluded, and is wholly retrospective.

With these few remarks we proceed to give an outline of the Act.

The Act applies to all "settlements" as defined in the Act, whether executed before or after the commencement (sect. 2); and its provisions cannot by any means be excluded. (Sects. 51, 52.)

The Court referred to in the Act signifies the High Court of Justice (sect. 2), and the Chancery Division of that Court; but the powers of the Court may, where the land, &c. does not exceed 500*l.*, or the annual value 30*l.*, be exercised by the County Court of the district. (Sect. 46.)

A tenant for life (and this includes various other persons, *inter alia*, a tenant in tail, a tenant in fee simple with an executory limitation over, a tenant in base fee, a tenant for years determinable on a life, a tenant *pur autre vie*, not holding merely under a lease at a rent, a tenant by the curtesy, a tenant after possibility of issue extinct, &c., sect. 58) has the following powers (which are not assignable, and a contract not to exercise which is void, sect. 50) with regard to the settled land, or any part thereof: (1) to sell; (2) to exchange; (3) to enfranchise; (4) to concur in making partition; (5) to lease for ordinary purposes, or for mining or building purposes, and to accept surrenders of leases, to confirm a voidable lease, and licence copyholders to grant leases; (6) to make improvements; (7) to mortgage, but only for the purposes of raising money for equality of exchange or partition, or for the purpose of enfranchisement; (8) to make, vary, rescind and accept surrenders of contracts for any of the foregoing purposes. (Sects. 3, 6, 12, 13, 14, 16, 18, 19, 31.)

These powers cannot be exercised until after the expiration of one month from the time of giving notice to the trustees of the settlement, of whom there must be two at least, unless a contrary intention is expressed in the trust instrument, and also to the solicitor of the trustees; if known, of his intention to sell, &c. (Sect. 48.)

If there are no trustees to receive notice, application must be made to the Court to appoint them. (Sect. 38.)

The tenant for life in exercising these statutory powers must be careful to do nothing to injure the rights of the remaindermen, &c., for he is a trustee for them, and accountable for any injury they may sustain (sect. 53); but persons dealing with the tenant for life in

good faith are protected. (Sect. 54.) In particular the Act makes the following provisions :—

- (1) In *selling*, the tenant must get the best price that can be reasonably obtained. (Sect. 4.) If there is an incumbrance on the part of the settled land desired to be sold, and the incumbrancer consents, the incumbrance may be charged on some other part of the land. (Sect. 5.)
- (2) In *exchanging* and making *partition*, a sum of money may be taken or given by way of equality of exchange or partition. (Sect. 3.)
- (3) In *leasing*, the term must not exceed ninety-nine years for a building lease, sixty years for a mining lease, twenty-one years (or thirty-five years if the lands are in Ireland, sect. 65) in any other case. (Sect. 6.) The lease must be by deed, made to take effect within twelve months, reserving the best rent, regard being had to any fine taken (but in building and mining leases special provisions as to the rent are made). There must be a covenant to pay the rent, and a condition of re-entry if the rent is not paid within thirty days of falling due. A counterpart must be executed by the lessee. (Sects. 7, 8, 9 and 10.) Under a mining lease, one-fourth of the rent belongs to the tenant if he is impeachable for waste, and three-fourths if he is unimpeachable. The balance is deemed "capital money" (of which more hereafter). (Sect. 11.)

The mansion-house and demesnes cannot be leased or sold without the consent of the trustees of the settlement, or an order of the Court. (Sect. 15.) The sale, &c. may be made of the land without the mines, or of the mines without the land. (Sect. 17.)

The tenant for life for the purpose of giving effect to the sale, exchange, lease, &c., can convey the land as may be needed, without the concurrence of the remaindermen, or of the trustees; but if the settled lands are of copyhold tenure, the deed must be entered on the court rolls, and the fees, fines, &c. paid, the steward having the right to see so much of the settlement as may be sufficient to show the title of the person executing the deed. (Sect. 20.)

The money derived from any such sale, &c. is called "capital money," and must not be paid to the tenant for life, but, at his option,

either into Court or to the trustees of the settlement (sect. 26) ; and if to the latter, there must be two at least, unless one is empowered to act by the settlement (sect. 39) ; and if there are no trustees, they must be appointed by the Court (sect. 38), and the receipt of the trustees is a sufficient discharge. (Sect. 40.)

The capital money being thus in Court, or in the hands of the trustees of the settlement, can be applied in any of the following ways, at the option of the tenant for life :—

- (1) In investment in personal securities open by law to trustees or allowed by the settlement, including debenture stock of a railway company in Great Britain or Ireland, having paid dividends on its ordinary stock for ten years immediately preceding.
- (2) Discharge of incumbrances, redeeming land tax, &c. on the settled land.
- (3) In buying other lands, whether freehold, copyhold or leasehold, not having less than 60 years to run. (Sect. 18.)
- (4) In making any one or more of the various improvements allowed by the Act, *e.g.* drainage, embanking, inclosing, making roads, erecting cottages or farmhouses, reservoirs, markets, tramways, railways, canals, sewers, streets, squares, gardens, trial pits for mines, &c. (sect. 25) ; but, before the money can be laid out in any of these improvements, the trustees or the Court must be satisfied, on the certificate of the land commissioners, or of a competent engineer, or able practical surveyor, that the improvement has been made, and what amount is payable in respect of it. (Sect. 26.) Improvements must be maintained and repaired by the tenant for life and his successors in title, and the buildings (if any) erected insured as the land commissioners may direct. (Sect. 28.)
- (5) In payment of costs, &c. (Sect. 47.)

Trustees of a settlement having moneys in their hands liable to be laid out in the purchase of lands, may, if the tenant for life consent, invest the same in any of the above modes (sect. 33), and so money paid into Court under the Lands Clauses Act, the Settled Estates Act, and other statutes, may be so invested. (Sect. 32.)

When there is no capital money available for improvements, the tenant for life may apply to the Land (formerly Inclosure) Commis-

sioners, and they may allow the settled land to be mortgaged in the manner laid down in the Improvement of Land Act, 1864, for the purpose of effecting any of the improvements for which capital money may be used under this Act. (Sect. 30.)

The settled lands may also be mortgaged for the purpose of raising money, for equality of exchange or partition, or for enfranchisement; but in the other cases the tenant for life may not mortgage, though he may sell the lands outright. Other powers which the tenant for life has, but in exercising which certain consent is required, are:—(1) When timber is ripe and fit for cutting, although impeachable for waste, he may, on obtaining the consent of the trustees or an order of the Court, cut and sell the same, three-fourths of the proceeds being deemed capital money and the remaining one-fourth being paid to the tenant for life. (Sect. 35.) Of course if, as often happens, he is tenant for life without impeachment for waste, he can cut and sell the timber (except ornamental timber) at his pleasure, and the whole proceeds belong to him. (*Levis Bowles' case*.) (2) When there are personal chattels settled to devolve with the land (commonly but erroneously called "heirlooms"), he may, on getting an order of the Court, sell the heirlooms, the proceeds being deemed "capital money," and so it can be applied in the manner above mentioned, and also in buying other chattels to be held on the same trusts. (Sect. 37.)

The powers conferred by the Act take precedence over any similar powers given by the settlement, and if the statutory and settlement powers conflict, then the statutory powers prevail (sect. 56); but additional or larger powers can be given by the settlement. (Sect. 57.)

If the tenant for life is an infant, the powers can be exercised by the trustees of the settlement, and if none, by such person as the Court, on the application of a testamentary or other guardian or next friend of the infant, orders (sect. 60); and the lands of an infant can be sold, leased, &c. under the Act, by the trustees or such person as aforesaid, even though the lands are not settled lands, and the infant is not a tenant for life, but entitled in his own right to the land. (Sect. 59.)

If a tenant for life is a married woman, she may exercise the power of the Act as if a *feme sole*, if the property belongs to her for her separate use, even though there is a restraint on anticipation; but if not settled to her separate use, she and her husband together have the powers of a tenant for life under the Act. (Sect. 61.)

If a tenant for life is a lunatic so found by inquisition, the committee may exercise the powers of the Act, but only on obtaining an order from the Lord Chancellor or the judges having jurisdiction in lunacy.

The statute applies in a limited manner to settlements in which lands are directed to be sold and converted into money, and the income until sale is payable to some person for life. (Sect. 63.)

The "Inclosure," Copyhold," and "Tithes" Commissioners are in future to be styled "Land Commissioners." (Sect. 48.)

A trustee of a settlement is only responsible for his own acts, receipts, and defaults, and not for those of any co-trustee or any banker, broker or agent, or for any loss not happening through his own wilful default. (Sect. 41.)

Trustees of a settlement are not liable for giving any consent, or doing or making, or abstaining from doing or making, any act or application in connection with the exercise by the tenant for life of the powers conferred on him by this Act. (Sect. 42.)

Trustees of a settlement may reimburse themselves out of the trust property all expenses properly incurred by them. (Sect. 43.)

Differences arising between the tenant for life and the trustees may be settled by the Court. (Sect. 44.)

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## THE MARRIED WOMEN'S PROPERTY ACT, 1882.

(45 & 46 VICT. c. 75.)

The effect of this revolutionary statute is to place a married woman for most purposes in the position of a *feme sole*, at least with regard to the acquiring, holding and disposing of property, and the old idea that man and wife are one person is exploded.

The provisions of the statute must be borne in mind by the student whenever in the Commentaries the law of married women is discussed, and particularly in connection with:—

- (1) The subject of tenancy *by entireries*, treated of in the Chapter on Joint Tenants in Vol. I. (Book II. Pt. I. Ch. VIII.), for such a tenancy cannot now be created, since property limited to a man and wife without words of severance will make

them joint tenants, and not tenants by entireties, as the share in the property vests in the wife as if she were a *feme sole*. (*Mander v. Harris*, Law Notes, Vol. I. p. 203.)

- (2) The subject of the purchase and conveyance of lands by married women, treated of in the Chapters on Title by Alienation and Fines and Recoveries in Vol. I. (Book II. Pt. I., Chs. XV., XIX.); for a married woman can now purchase and convey as if a *feme sole*, and a deed acknowledged will only be necessary in dealing with property acquired by married women before 1st January, 1883.
- (3) The law of "husband and wife," treated of in the Chapter on the subject in Vol. II. (Book III. Ch. II.).

We now add an epitome of the Act, which should be added to the list of statutes given in the Guide to Stephen, pp. 182—186, and got up as additional work for the Eighth Week.

#### ACQUISITION AND DISPOSITION OF PROPERTY BY MARRIED WOMEN.

A married woman can now acquire, hold and dispose of, any property, real or personal, as her separate property, as if a *feme sole*, without the intervention of any trustee. (Sect. 1, sub-s. 1.)

All property belonging to a woman who marries on or after 1st January, 1883, at the time of her marriage, or which comes to her after marriage, including earnings and property acquired by the exercise of any skill or labour, is her separate use property. (Sect. 3.)

All property, including earnings and property acquired as aforesaid, coming to a woman married before the 1st January, 1883, is to belong to her for her separate use, provided her title, whether in possession, reversion or remainder, and whether vested or contingent, accrues on or after that date. (Sect. 5.)

#### CONTRACTS BY MARRIED WOMEN.

Any married woman can render herself liable on contracts in respect of, and to the extent of, her separate estate; and every contract made by her will be deemed to bind her separate estate, as well that which she has at the date of the contract as that subsequently acquired. And she can sue and be sued, not only on contract, but also on tort, as if a *feme sole*, and her husband is not a necessary party, and the damages and costs recovered by her are her separate property; and

costs and damages recovered against her are payable out of her separate estate, and not otherwise. (Sect. 1, sub-sects. 2, 3 and 4.)

A married woman trading separately from her husband is, in respect of her separate property, subject to the bankruptcy laws as if a *feme sole*. (Sect. 1, sub-sect. 5.)

Any money which the wife lends the husband passes as part of his assets if he becomes bankrupt; but the wife may rank as a creditor therefor after all the other creditors for value have been paid in full. (Sect. 3.)

A married woman, by executing a general power of appointment by will, makes the property appointed liable in the same manner as her separate estate for her debts. (Sect. 4.)

#### MARRIED WOMEN AS HOLDERS OF STOCK AND SHARES.

A married woman may hold stock and shares in companies, annuities, public stocks and funds, deposits in banks, shares in friendly, benefit, &c. societies, and the dividends, &c. are to be paid to her on her own receipt. (Sect. 6.) These stocks and shares, &c. can be transferred by the woman alone, and any liability attaching to them the separate estate of the woman is alone liable to make good. Nothing in the Act requires or authorizes any corporation or joint stock company to admit any married woman to hold any shares *to which any liability may be incident*, contrary to the provisions of any Act of Parliament, charter, &c. (Sect. 7.)

[This is a great extension, for the Married Women's Property Act of 1870 only allowed shares, &c. to which no liability was attached to be taken by married women. Provision is made enabling a married woman to hold such securities jointly with another, and for transferring the same with that other without the husband's concurrence. (Sects. 8 and 9.)]

If any such investments are made with moneys of the husband, the Court may order the investments to be transferred to the husband, and the dividends to be paid to him. (Sect. 10.)

#### POLICIES OF ASSURANCE BY MARRIED WOMEN, &c.

A married woman may effect a policy on her own life or the life of her husband for her separate use; and a policy effected by a man on his life and expressed to be for the benefit of his wife <sup>or</sup> <sub>and</sub> children,

or by a woman on her life and expressed to be for the benefit of her husband <sup>or</sup> <sub>and</sub> children, creates a trust in favour of the objects named, and the moneys payable under the policy are not to be liable to the debts of the assured; but creditors, if they can prove that the policy was effected and premiums paid with intent to defraud them, are entitled to be paid a sum equal to the premiums so paid. A trustee to receive the policy moneys may be appointed (provision being made for the appointment of a new trustee), and if no trustee appointed the policy vests in the assured and his or her personal representatives, in trust for the purposes aforesaid.

The receipt of the trustee or the legal personal representative, when no trustee or no notice of the appointment of a trustee is given to the insurance company, is a discharge to the insurance company for the money secured by the policy, or for the value thereof, in whole or in part. (Sect. 11.)

[A very similar provision was contained in the Act of 1870.]

#### ACTIONS BY AND AGAINST MARRIED WOMEN.

Every married woman has the same remedies, civil and criminal, against all persons, including her husband, for the protection and security of her separate property as if such property belonged to her as a *feme sole*. (Sect. 12.)

Every man can take *criminal* proceedings against his wife for any act of hers with respect to his property which, if done by the husband, would make him liable to criminal proceedings by his wife. (Sect. 16.)

In enforcing such remedies husbands and wives to be competent witnesses against each other. (Sect. 12.)

No criminal proceedings to be taken by a wife against her husband (nor *vice versa*, sect. 16) unless they are living apart, or unless the property was wrongfully taken when the husband (or the wife) was leaving or about to leave his wife (or her husband); and except as aforesaid no husband or wife can sue the other for a tort. (Sect. 12.)

#### ANTE-NUPTIAL CONTRACTS AND TORTS OF MARRIED WOMEN.

Sects. 13, 14 and 15 regulate the law as to the liability of husbands of women married on or after 1st January, 1883, for the ante-nuptial debts, contracts (including liability as contributory of a company) and torts of the wife, and in effect enact that the husband shall only



be responsible to the extent of the assets he acquired or became entitled to with his wife (it must be borne in mind that, by reason of sect. 3 of the Act (*ante*, p. 29), he acquires nothing now by marriage, unless the wife's property is settled on him), and that the wife is responsible out of her separate estate. Apparently the action can be brought against husband and wife jointly, or against husband alone or wife alone; but when the husband is sued and it is proved that he did not become entitled to any property with his wife, he will get judgment for his costs.

[This is a very similar provision to that contained in the Act of 1874, but under that Act, it was held that the action must be brought against husband and wife *jointly*, so that if the wife died, or the parties were divorced, no action could be brought (see *Bell v. Tucker* (or *Stocker*), Law Notes, Vol. II. p. 8), while under the Act of 1882 apparently an action would lie against husband or wife alone.

The student will bear in mind that, in answering any question as to the husband's liability for the wife's ante-nuptial contracts and torts, the essential point to consider is *the date of the marriage*, for if married before 9th August, 1870, he is liable for all ante-nuptial contracts and torts, whether he had assets with his wife or not. If between 9th August, 1870, and 30th July, 1874, he is not liable at all for her ante-nuptial contracts, but liable for her torts (33 & 34 Vict. c. 93). If married between 30th July, 1874, and 31st December, 1882, he is liable for both contracts and torts to the extent of any assets, as defined in the Act, he received with her, or might have received by using due diligence, but he must be sued during coverture (37 & 38 Vict. c. 50); while, if married since 31st December, 1882, he is liable for the ante-nuptial contracts and torts to the extent of the assets he received or became entitled to, and apparently he can be sued after coverture is at an end.]

#### DISPUTES BETWEEN HUSBAND AND WIFE.

Questions between husband and wife as to the title to or possession of property in any bank, corporation, &c., in whose books any stocks, &c. of either party are standing, may be settled by a judge of the High Court on summons, or by the County Court judge, without regard to amount. Orders made can be appealed against, and when proceedings are commenced in the County Court, which, owing to the amount involved, could not but for this Act or the Act of 1870

have been heard in the County Court, the respondent or defendant may have the same transferred to the High Court by writ of certiorari.

A judge may hear any application under the Act, if either party so require, in his private room. Any bank, corporation, &c. is considered as a stakeholder only. (Sect. 17.)

#### MARRIED WOMEN AS TRUSTEES AND EXECUTORS.

Where a married woman is trustee or executrix she can sue and be sued as a *feme sole*, and can transfer any annuity, stocks, or shares vested in her in the character of trustee, &c. as if she were a *feme sole*. (Sect. 18.)

[It is noticeable that this section does not speak of transferring any other property besides annuities, stocks, and the like, and the question suggests itself, can a married woman who is trustee of real property convey it as a *feme sole*? Probably she can, under the wide terms of sect. 1 of the Act.]

The power to contract includes the right to accept any trust or the office of executrix or administratrix, and the separate estate is liable for breach of trust or devastavit committed by a married woman, whether before or after marriage, and the husband is not liable unless he has acted or intermeddled. (Sect. 24.)

#### SETTLEMENTS.

The Act does not affect existing or future settlements, nor does it interfere with or render inoperative any restrictions against anticipation. But no such restriction contained in a settlement made by a woman of her own property is to have any validity against antenuptial debts, nor is any settlement by a woman to be binding against her creditors if, had it been made by a man, it would be void against his creditors.

[Settlements will still be used in a great many cases; for though the Act supplies the place of a settlement to some extent, yet many things are usually done by a marriage settlement or will, which are left entirely untouched by the Act. Thus the Act removes the husband's marital *rights*, but it does not remove the marital *control*; and if it is wished that a woman shall hold her property so that her husband cannot induce her "by his kicks or kisses" to dispose of it in his

favour, it must still be settled on the wife with restraint on anticipation. So, too, the Act makes no provision for the husband, while under a settlement he generally gets a life interest in his wife's property after her death; and so to protect the husband a settlement is still necessary. Again, settlements make provision for the children—this is not done by the Act. Trustees are interposed by a settlement—there are none given by the Act. Consequently settlements will be still in general use, and when they are used they may abridge, control or enlarge the statutory rights of the woman.]

#### LIABILITY OF MARRIED WOMEN UNDER THE POOR LAWS.

A summons can be issued against a married woman for the purpose of compelling her to support her pauper husband, and the justices may make and enforce an order against the wife to support her husband out of her separate estate, as they may, under the 33rd section of the Poor Law Amendment Act, 1868, make and enforce against a husband for the maintenance of his wife. (Sect. 20.)

A married woman is liable to maintain her children and grandchildren out of her separate estate, as her husband is liable by law to do, but not so as to relieve the husband from responsibility. (Sect. 21.)

[The Act of 1870 only cast the responsibility on the woman to support her children, not grandchildren. (See *Coleman v. Overseers of Birmingham*, 6 Q. B. D. 615.)]

#### REPEALS.

The Married Women's Property Act, 1870, and Amendment Act, 1874, are repealed, but this repeal does not extend to acts done, rights and liabilities of any husband or wife, married before 1st January, 1883, to sue or be sued under the Acts repealed, or either of them, for debts, wrongs or things whatsoever for, in, or in respect of which any such right or liability accrued before the 1st January, 1883. (Sect. 22.)

#### DEVOLUTION OF PROPERTY.

The legal personal representative of any married woman has, in respect of her separate estate, the same rights and liabilities, and is subject to the same jurisdiction, as she would be if she were living. (Sect. 23.)

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